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tatus: GRANTED                  v.
                                Hana Koecher

ocketed:                Court:  United States Court of Appeals
une 10, 1985                    for the Second Circuit

                        Counsel for petitioner: Solicitor General

                        Counsel for respondent: Lynch, Gerard E.

ntry     Date     Note                  Proceedings and Orders
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  1    Jun 10 1985 G Petition for writ of certiorari filed.
  2    Jul 15 1985   Brief of respondent Hana Koecher in opposition filed.
  3    Jul 17 1985        DISTRIBUTED. September 30, 1985
  4    Oct  7 1985        Petition GRANTED.
                          ***************************************************
  5    Nov  1 1985        Record filed.
  6    Nov  1 1985        Certified copy of original record & proceedings
                          received.
  7    Nov  7 1985 G      Motion of the Solicitor General to dispense with
                          printing the joint appendix filed.
  8    Nov 18 1985        Motion of the Solicitor General to dispense with
                          printing the joint appendix GRANTED.
  9    Nov 21 1985        SET FOR ARGUMENT, Wednesday, January 15, 1986. (3rd
                          case).
 10    Nov 22 1985   Brief of petitioner United States filed.
 11    Dec  9 1985        CIRCULATED.
 12    Dec 26 1985 X Brief of respondent Hana Koecher filed.
 13    Jan  9 1986 X Reply brief of petitioner United States filed.
 14    Jan 15 1986        ARGUED.
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PETITION FOR WRIT OF CERTIORARI

84-1922 ①

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FILED
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CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

HANA KOECHER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether a witness has a privilege to refuse to testify concerning criminal activity in which she and her husband jointly participated on the ground that the testimony would be adverse to the interests of her husband.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

UNITED STATES OF AMERICA, PETITIONER

v.

HANA KOECHER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 755 F.2d 1022. The prior order of the court of appeals (App., *infra*, 16a-18a) is unreported. The opinion (App., *infra*, 24a-39a), oral order (App., *infra*, 19a-20a), and written order (App., *infra*, 21a-23a) of the district court on remand are unreported. The prior written opinion of the district court (App., *infra*, 40a-55a) is reported at 601 F. Supp. 385. The prior oral opinion of the district court (App., *infra*, 56a-60a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 61a-62a) was entered on February 28, 1985. A petition for rehearing was denied on April 11, 1985 (App., *infra*, 63a-64a). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. A grand jury in the United States District Court for the Southern District of New York is investigating espionage activity believed to have been engaged in by respondent and her husband, Karel F. Koecher. The inquiry focuses upon the transmittal to the Czechoslovak Socialist Republic of information and classified documents obtained by Karel Koecher while he was employed by the Central Intelligence Agency.

On November 27, 1984, several hours before he and respondent were to leave the United States, Karel Koecher was arrested on a complaint charging him with conspiring to communicate classified national defense information to the Czechoslovak Intelligence Service from 1973 to 1975. C.A. App. 97-99; App., *infra*, 2a, 36a. Respondent was arrested as a material witness on the basis of an affidavit stating that she and her husband "were directed by agents of the Czechoslovak Intelligence Service to attempt to penetrate United States intelligence agencies" and that she acted as a paid courier for the Czechoslovak Intelligence Service. C.A. App. 95-96; App., *infra*, 35a-36a.

Both the complaint and the affidavit were based upon Karel Koecher's written confession, in which he admitted that between 1963 and 1965 he had been trained to serve in the United States as an officer of the Czechoslovak Intelligence Service. Koecher was instructed to "penetrate" the Central Intelligence Agency, and in February 1973 he gained employment with the CIA. The complaint states that Koecher admitted that "[b]etween February 1973 and August 1975, [he] passed to the Czechoslovak Intelligence Service virtually any classified or other material, information, assessments, and CIA personnel identifications which he obtained or learned during his CIA employment." C.A. App. 98; App., *infra*, 35a-36a.

Respondent appeared before the grand jury pursuant to a subpoena on November 29, 1984, but declined to answer questions concerning her espionage activities.[1] Respondent claimed a privilege not to give testimony adverse to the interests of her husband.[2] The government sought an order from the district court directing respondent to answer the questions, contending that the privilege against adverse spousal testimony did not apply because respondent participated jointly with her husband in the criminal activity under investigation by the grand jury. Respondent did not contest the government's claim that she was involved in the espionage scheme; rather, she argued that there is no joint participant exception to the marital testimonial privilege. App., *infra*, 2a-3a, 40a-41a.

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[1] The questions were (App., *infra*, 2a n.1):

> Q. Mrs. Koecher, did you ever deliver classified information relating to the national defense of the United States to the Czechoslovakian Intelligence Service?
>
> Q. Mrs. Koecher, have you ever received money from agents of the Czechoslovakian Intelligence Service as payment for information and documents that you delivered to them?
>
> Q. Mrs. Koecher, have you ever met with agents of the Czechoslovakian Intelligence Service?

[2] Respondent also cited the privilege against disclosure of confidential marital communications, but she subsequently acknowledged that the questions did not require the disclosure of such confidential communications (see App., *infra*, 57a-58a). Respondent has not invoked her Fifth Amendment privilege against self-incrimination. If she had invoked that privilege, the government would, of course, have had the option of seeking an immunity order in order to gain respondent's testimony. See 18 U.S.C. 6002, 6003.

On December 4, 1984, the district court directed respondent to answer the questions (App., *infra*, 41a-42a).[3] The court rejected respondent's claim of privilege, concluding that "the testimonial disqualification sought by [respondent] should not be permitted to stand as a bar to testimony concerning a joint criminal enterprise in which a husband and wife are allegedly both engaged." *Ibid.* (footnote omitted).

The district court stated that "the appropriate analysis in a case involving the testimonial privilege is to 'decide whether the privilege against adverse spousal testimony promotes sufficiently important interests to outweigh the need for probative evidence in the administration of criminal justice.'" App., *infra*, 51a, quoting *Trammel* v. *United States*, 445 U.S. 40, 51 (1980). It found that there were "two interests underlying the privilege against adverse spousal testimony: (1) prevention of dissension between spouses which might result from testimony of one against the other; and (2) society's 'natural repugnance' at condemning a person on the compelled testimony of his or her spouse" (App., *infra*, 51a). The court concluded that "the recognition of a joint participants exception to the privilege against adverse spousal testimony will not seriously infringe upon the goals underlying that privilege" (*id.* at 54a). It observed

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[3] The court issued an oral ruling on that date (App., *infra*, 56a-60a) and more fully explained the reasons for its decision in a written opinion issued one week later (*id.* at 40a-55a).

that a spouse's testimony was unlikely to cause marital dissension where a husband and wife were partners in crime (*id.* at 53a). In addition, the court was "reluctant to interfere with the sweeping powers of the grand jury in its investigative function" (*id.* at 54a).

Respondent again refused to answer the questions that had been put to her before the grand jury, and the district court held her in civil contempt of court pursuant to 28 U.S.C. 1826(a).[4] She was committed to jail for 18 months or the life of the grand jury, whichever was shorter, or until she decided to answer the questions. App., *infra*, 42a.

2. While respondent's appeal of the district court's order was pending, Karel Koecher was indicted on one count of conspiracy to commit espionage, in violation of 18 U.S.C. 794(c). The overt acts in furtherance of the conspiracy described in the indictment include respondent's delivery to agents of the Czechoslovak Intelligence Service of a classified document obtained by her husband from the Central Intelligence Agency. Indictment at 2, *United States* v. *Koecher*, No. 84 Cr. 1001 (SWK) (S.D.N.Y.).

The court of appeals subsequently issued an order vacating the order of civil contempt (App., *infra*, 16a-18a). It observed that "[i]t is settled law that

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[4] 28 U.S.C. 1826(a) provides that "[w]henever a witness in any proceeding before * * * [a] grand jury of the United States refuses without just cause shown to comply with an order of the court to testify * * *, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony * * *." The period of confinement must end with the expiration of the term of the grand jury and cannot exceed 18 months (*ibid.*).

“‘* * * it is not a legitimate function of the grand jury to serve as a substitute for pretrial discovery.’ ” *Id.* at 17a, quoting 8 *Moore's Federal Practice* ¶ 6.04[5], at 6-86 (2d ed. 1984). The court of appeals remanded the case to the district court for consideration of (1) whether the dominant purpose of questioning respondent was to obtain discovery in connection with her husband's trial on the pending charge, and (2) "whether the particular questions asked by the Government which [respondent] refused to answer fall within the scope of the [marital] privilege, assuming that one exists" (App., *infra*, 18a).

On remand, the district court concluded that "the continued grand jury investigation after the return of the indictment * * * is not solely or predominantly for the purpose of obtaining evidence for use at the pending trial of that indictment" (App., *infra*, 35a). The court found that it was reasonable for the grand jury to seek to develop evidence concerning both other members of the conspiracy and any substantive offenses that may have been committed pursuant to the conspiracy (*id.* at 37a). With respect to the second issue, both parties agreed, and the district court found, that the questions posed to respondent before the grand jury fell within the scope of the marital testimonial privilege because the answers "could be potentially adverse to her husband" (*id.* at 32a).[5]

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[5] On remand, respondent raised for the first time the claim that the government had failed to show that she and her husband were joint participants in the espionage activities. The district court held that this argument was not open on remand (App., *infra*, 37a). The court also observed that the indictment "appears to answer the argument" because it "avers that one of the overt acts was committed by [respondent], thus evidencing probable cause to believe that she was a co-conspirator" (*ibid.*). The court noted that the affidavit

Respondent again refused to answer the questions, and the district court held her in contempt and entered the same confinement order as before (*id.* at 20a, 21a-23a).

3. The court of appeals reversed (App., *infra*, 1a-15a), holding "in agreement with the Third Circuit and in conflict with the Seventh and Tenth Circuits, that the marital privilege is not subject to a joint participant exception" (*id.* at 8a; footnote omitted). The court first stated that the absence of an express reservation of the issue in this Court's decision in *Trammel* v. *United States*, *supra*, "has some negative implications as regards the joint participant exception" (App., *infra*, 10a). The court of appeals found insufficient policy justification for a joint participant exception to the testimonial privilege. It stated that "while it may well be that the marital privilege should be abolished, we do not see sufficient reason for creating a joint participant exception" (*id.* at 11a).

The court observed, however, that its decision did "not mean that there is not something to be said on the other side" (App., *infra*, 11a). It noted that the courts of appeals were in agreement that the confidential marital communications privilege did not apply to communications for criminal ends, but indicated that the reasoning of these decisions did not apply to the testimonial privilege because the former seeks to protect "the intimacy of private marital communications" while the latter "is more broadly aimed at protecting marital harmony" (*id.* at 13a). The

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in support of the material witness warrant "shows probable cause that [respondent] participated in a joint criminal enterprise" (*id.* at 38a).

court concluded that "[i]n light of its existence since the early days of the common law and of the importance of the interests which the marital privilege serves, we would leave the creation of exceptions to the Supreme Court or to Congress" (*id.* at 14a).

REASONS FOR GRANTING THE PETITION

This case presents a significant question concerning the scope of a witness's privilege to refuse to give testimony adverse to the interests of his or her spouse.[6] The court of appeals held that respondent could rely on this privilege in refusing to testify before the grand jury even if she jointly participated with her husband in the crime under investigation. This decision conflicts squarely with decisions of the Seventh and Tenth Circuits holding that the privilege does not apply where the spouses are joint participants in criminal activity. Moreover, the analysis applied by the court of appeals cannot be reconciled with the view of the privilege set forth by this Court in *Trammel* v. *United States*, 445 U.S. 40 (1980). Society's interest in promoting the marital relationship—the interest that this Court has found to be served by the privilege—is sharply reduced when the marital relationship shelters a criminal partnership. The important goal of obtaining all probative evidence concerning criminal activity outweighs any societal interest in protecting such a relationship, and the court of appeals erred by upholding respondent's assertion of the privilege in this context.

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[6] This case does not concern the separate privilege against disclosure of confidential marital communications, which prohibits the admission into evidence of confidential communications between spouses (see App., *infra*, 8a).

1. As the court below acknowledged (App., *infra*, 8a), there is a square conflict among the courts of appeals concerning the issue presented by this case. The Seventh and Tenth Circuits have recognized a joint participant exception to the privilege against adverse spousal testimony, while the Third Circuit, and now the Second Circuit, have rejected such an exception. Compare *United States* v. *Clark*, 712 F.2d 299, 300-302 (7th Cir. 1983); *United States* v. *Trammel*, 583 F.2d 1166 (10th Cir. 1978), aff'd on other grounds, 445 U.S. 40 (1980); *United States* v. *Van Drunen*, 501 F.2d 1393, 1396 (7th Cir.), cert. denied, 419 U.S. 1091 (1974), with *In re Grand Jury Matter*, 673 F.2d 688 (3d Cir.), cert. denied, 459 U.S. 1015 (1982); *In re Malfitano*, 633 F.2d 276 (3d Cir. 1980).[7] Indeed, the court of appeals took the unusual step of indicating its view that this Court should address the question whether such an exception to the privilege should be recognized, commenting that "it may well be that the marital privilege should be abolished" (App., *infra*, 11a) but that it would "leave the creation of exceptions [to the privilege] to the Supreme Court or to Congress" (*id.* at 14a).

2. Moreover, the decision of the court of appeals rests upon a misunderstanding of the nature and

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[7] We note that the conflict among the courts of appeals is clearer now than it was when this Court denied certiorari in *United States* v. *Doe*, 459 U.S. 1015 (1982), in which this issue was the second question presented for review. The Second Circuit now has addressed the issue, broadening the conflict among the courts of appeals. In addition, the Seventh Circuit in *United States* v. *Clark*, *supra*, concluded that its recognition of the joint participant exception was consistent with this Court's decision in *Trammel*. Thus, it is now clear, as it may not have been at the time the petition in *Doe* was denied, that the conflict among the courts of appeals with respect to this issue survives this Court's decision in *Trammel*.

scope of the privilege against adverse spousal testimony.

a. In *Trammel* v. *United States*, this Court emphasized that "[t]estimonial * * * privileges contravene the fundamental principle that '"the public . . . has a right to every man's evidence"'" (445 U.S. at 50, quoting *United States* v. *Bryan*, 339 U.S. 323, 331 (1950)). These privileges therefore "must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" 445 U.S. at 50, quoting *Elkins* v. *United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting); accord, *United States* v. *Nixon*, 418 U.S. 683, 709-710 (1974). The inquiry in this context is "whether the privilege against adverse spousal testimony promotes sufficiently important interests to outweigh the need for probative evidence in the administration of criminal justice" (*Trammel*, 445 U.S. at 51).[8]

Trammel modified the common-law rule that the privilege against adverse spousal testimony could be asserted by the defendant-spouse. The Court stated that "[t]he modern justification for this privilege against adverse spousal testimony is its perceived role in fostering the harmony and sanctity of the marriage relationship" (445 U.S. at 44).[9] It found

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[8] Congress has authorized the courts to define the scope of evidentiary privileges in light of "reason and experience." Fed. R. Evid. 501; see also *Trammel*, 445 U.S. at 47.

[9] The privilege has its roots in "two now long-abandoned doctrines"—the rule that a defendant could not testify in his own behalf because of his interest in the proceeding and the principle that husband and wife were one in the eyes of the

that when a spouse is willing to testify "there is probably little in the way of marital harmony for the privilege to preserve" (*id.* at 52), and concluded that "[t]his modification—vesting the privilege in the witness-spouse—furthers the important public interest in marital harmony without unduly burdening legitimate law enforcement needs" (*id.* at 53).[10]

The court below erred by failing to apply the balancing test set forth in *Trammel* to determine whether to recognize a joint participant exception to the privilege against adverse spousal testimony. The interest underlying the privilege is substantially reduced, and the interest in obtaining probative testimony is greatly enhanced, when the spouse asserting the privilege participated in the defendant-spouse's criminal activity. Recognition of the privilege in this context therefore contravenes *Trammel*'s injunction that testimonial privileges should not be recognized unless, on balance, they promote the public good.[11]

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law (*Trammel*, 445 U.S. at 44). From these concepts "it followed that what was inadmissible from the lips of the defendant-husband was also inadmissible from his wife" (*ibid.*).

[10] The Court acknowledged that the privilege had been "sharply criticized" by commentators (445 U.S. at 44 (footnote omitted)), with Professor Wigmore describing it as "'the merest anachronism in legal theory and an indefensible obstruction to truth in practice'" (*id.* at 45, quoting 8 J. Wigmore, *Evidence* § 2228, at 221 (McNaughton rev. 1961)). In addition, the Court noted that the model evidentiary codes adopted by the American Law Institute and the National Conference of Commissioners on Uniform State Laws abolished the privilege, and that support for the privilege in state law "has been eroded" (445 U.S. at 45, 48-49).

[11] The court below concluded that this Court's decision in *Trammel* "has some negative implications as regards the

The decision by a husband and wife to use their union for unlawful purposes itself gravely diminishes the "sanctity" of marriage and the "family peace" that the privilege seeks to protect (cf. *Trammel*, 445 U.S. at 44, 52).[12] As the Tenth Circuit observed in holding that the privilege did not apply where the spouses were partners in a drug importation scheme, "[i]t is inconceivable that the [spouses] established a 'home' with any of the usual, ordinary attributes of 'family life.' There was no domestic harmony in the commonly accepted nature of a marital relationship to be preserved following commencement of the criminal activities * * *" (*United States* v. *Trammel*,

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joint participant exception," apparently because this Court chose to decide that case on a different ground without expressly reserving the question of the existence of a joint participant exception (App., *infra*, 10a). We argued in *Trammel* (78-5705 U.S. Br. at 25-29) that the court of appeals was correct in recognizing a joint participant exception to the privilege, but the broader principle adopted by this Court was our preferred argument (*id.* at 16-25). Since this Court did not address the former issue, and resolution of that issue was not necessary to the Court's decision, there simply is no basis for the court of appeals' assertion that *Trammel* sub silentio rejected a joint participant exception.

[12] The court below referred to the "natural repugnance" of forcing one spouse to testify against the other as an interest underlying the privilege (App., *infra*, 14a). This Court did not identify such an interest in *Trammel*, and it appears that this factor is subsumed in the protection of marital harmony. Moreover, the argument that any such "natural repugnance" should outweigh society's interest in obtaining probative evidence is considerably undercut by the criticism of the privilege and the trend in state law to abolish the privilege and permit the compelled testimony of spouses in criminal proceedings. See page 11 note 10, *supra*; page 15 note 15, *infra*.

583 F.2d at 1170). When spouses act as partners in crime, their behavior is antithetical to values society seeks to derive from the marriage relationship; the privilege therefore should not apply to shield evidence of their joint criminal activity.[13]

The court of appeals stated that it was "unable to accept the proposition that a marriage cannot be a devoted one simply because at some time the partners have decided to engage in a criminal activity." App., *infra*, 11a; see also *In re Malfitano*, 633 F.2d at 278. However, the question is not whether the marriage is devoted; it is whether a marriage that shelters joint criminal activity should be protected and encouraged at the cost to society of forgoing important evidence about that activity. We submit that where the spouses themselves have chosen to convert their "sacred" relationship (*Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965)) into a criminal partnership, they forfeit any right to such societal protection —at least with respect to inquiries into their joint criminal activities.[14]

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[13] The Seventh Circuit cited the rehabilitative effect of marriage on the defendant-spouse as one justification for the privilege. It noted that this rehabilitative effect is "diminished" where both spouses participated in the crime, and relied upon this fact as grounds for recognizing the joint participant exception. *United States* v. *Clark*, 712 F.2d at 301. The court below rejected the view that rehabilitation was an interest served by the privilege and stated that participation by both spouses "would not necessarily remove the remorse which would trigger rehabilitation" (App., *infra*, 11a). However, this rehabilitative effect is clearly relevant because the socializing influence of the family is one major reason for the family's value to society. The beneficial influence that would be exerted by a non-criminal spouse plainly would be lacking where both spouses engaged in criminal activity. See *Callanan* v. *United States*, 364 U.S. 587, 593 (1961) (partnership in crime "decreases the probability that the individuals involved will depart from their path of criminality").

In addition, any interest society might have in preserving marital harmony in this context is outweighed by the second element of the balancing test established in *Trammel*: the interest in obtaining probative evidence relevant to enforcement of the criminal laws. This consideration—which was completely ignored by the court of appeals—is enhanced when the injury inflicted on the public results from the use of the marital relationship for unlawful purposes.

There is a greater interest in the detection of joint criminal activity because, as this Court has recognized (*Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961)), such activity poses an increased threat to society:

> [C]ollective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish.

In the present case, the criminal partnership between respondent and her husband was directed toward the crime of espionage, a grave offense threatening the very security of our nation. Given the way the crime was apparently committed, it would have been difficult for either spouse alone to commit this offense. Moreover, espionage by its nature is a difficult offense to investigate. Participants in the crime often are beyond the reach of law enforcement officers because they are located in foreign countries or entitled to rely upon diplomatic immunity. Permitting respondent to invoke the privilege therefore is likely to impede substantially the government's vital law enforcement efforts in this area. Since in the context of marital conspirators the privilege does not "promote[] sufficiently important interests to outweigh the need for probative evidence in the administration of criminal justice" (*Trammel*, 445 U.S. at 51), it should not apply to shield respondent from testifying before the grand jury.[15]

b. In addition, the shield against compelled testimony by an accomplice-spouse erected by the court below could tend to promote the recruitment of spouses as partners in crime. The Seventh Circuit observed that the "goal [of preserving the family] does not justify assuring a criminal that he can enlist the aid of his spouse in a criminal enterprise without fear that by recruiting an accomplice or co-conspirator he is creating another potential witness." *United States* v. *Van Drunen*, 501 F.2d at 1396; see also *United States* v. *Clark*, 712 F.2d at 301-302; *United States* v. *Trammel*, 583 F.2d at 1169-1170. Under the rule adopted by the court of appeals an accomplice-spouse can decide whether or not he will testify, while any other accomplice could be required to testify pursuant to a grant of immunity. For this reason, in the absence of a joint participant exception, criminals clearly retain an incentive to recruit their spouses rather than third parties as participants in unlawful ventures. Thus, the privilege as construed by the court below encourages abuse of the relationship that it is designed to protect.

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[14] In other contexts in which the marital relationship is abused, such as where the defendant-spouse has committed a crime against the other spouse, the children, or the spouse's property, the general rule is that the privilege does not apply. See *Trammel*, 445 U.S. at 46 n.7.

[15] This result is especially appropriate in view of the uncertainty surrounding the effect of the privilege on marital harmony. See *Hawkins* v. *United States*, 358 U.S. 74, 81-82 & n.4 (1958) (Stewart, J., concurring). The erosion in the recognition of the privilege under state law noted by this Court in *Trammel* (445 U.S. at 48-49 & n.9) can rest only upon the view that the privilege is not in fact necessary to preserve marital harmony. This trend in state law has continued; since this Court's decision in *Trammel* two additional States have abolished the privilege. See Iowa Code Ann. § 622.7 (repealed) (West Supp. 1984-1985); *State* v. *Freeman*, 276 S.E.2d 450 (N.C. 1981).

c. Finally, the decision of the court below is in conflict with decisions recognizing partner-in-crime exceptions to other testimonial privileges. Such an exception has long been the rule in the case of the attorney-client privilege. It is settled that a client cannot assert the privilege to prevent his attorney from testifying concerning the client's efforts to obtain legal advice in connection with a plan to violate the law. *E.g., Clark* v. *United States*, 289 U.S. 1, 15 (1933); *United States* v. *Horvath*, 731 F.2d 557, 562 (8th Cir. 1984); *United States* v. *Dyer*, 722 F.2d 174, 177 (5th Cir. 1983); *In re Special September 1978 Grand Jury* (*II*), 640 F.2d 49, 59 (7th Cir. 1980); *United States* v. *Mardian*, 546 F.2d 973, 982 (D.C. Cir. 1976) (en banc).

Even more relevant in the present case is the fact that all of the courts of appeals that have addressed the issue have concluded that the privilege protecting confidential communications between husband and wife does not apply to communications in furtherance of the spouses' joint criminal activity. See *United States* v. *Sims*, No. 82-1523 (6th Cir. Feb. 28, 1985), petition for cert. pending, No. 84-6631; *United States* v. *Broome*, 732 F.2d 363, 365 (4th Cir. 1984), cert. denied, No. 84-118 (Oct. 1, 1984); *United States* v. *Ammar*, 714 F.2d 238, 258 (3d Cir. 1983), cert. denied, No. 83-319 (Oct. 31, 1983); *United States* v. *Entrekin*, 624 F.2d 597, 598 (5th Cir. 1980), cert. denied, 451 U.S. 971 (1981); *United States* v. *Price*, 577 F.2d 1356, 1364-1365 (9th Cir. 1978), cert. denied, 439 U.S. 1068 (1979); *United States* v. *Kahn*, 471 F.2d 191, 194-195 (7th Cir. 1972), cert. denied, 411 U.S. 986 (1973), rev'd on other grounds, 415 U.S. 143 (1974).

This privilege specifically protects the privacy of marital communications, but its basic purpose is to promote the marital relationship by encouraging the exchange of confidences between husband and wife. See *Wolfle* v. *United States*, 291 U.S. 7, 14 (1934); 8 J. Wigmore, *Evidence* § 2332 (McNaughton rev. 1961). The courts recognizing the exception have concluded that this purpose must give way when a communication discusses spouses' joint criminal activity—a type of communication the marital relationship is not meant to encourage. *United States* v. *Mendoza*, 574 F.2d 1373, 1380-1381 (5th Cir.), cert. denied, 439 U.S. 988 (1978); *United States* v. *Kahn*, 471 F.2d at 194; see also *United States* v. *Broome*, 732 F.2d at 365. The same policy supports an analogous exception to the privilege against adverse spousal testimony.[16]

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[16] The court below asserted that a distinction between the two marital privileges is permissible because of "a difference between the rationales underlying" them. App., *infra*, 12a-13a, citing *United States* v. *Ammar*, 714 F.2d 238, 257-258

In sum, "reason and experience" (see Fed. R. Evid. 501) compel the conclusion that the privilege against adverse spousal testimony should not apply where the spouses are partners in crime. In *Trammel* this Court proceeded with "caution" in modifying the privilege, but recognized that "the law on occasion adheres to doctrinal concepts long after the reasons which gave them birth have disappeared and after experience suggests the need for change" (445 U.S. at 48). The rule adopted by the court below harkens back to the discredited "ancient foundations" that formerly supported the privilege (see page 10 note 9, *supra*);

(3d Cir. 1983), cert. denied, No. 83-319 (Oct. 31, 1983). However, the differences are outweighed by the similarities with respect to the present issue. Although the purpose of encouraging confidences between spouses would be furthered if the communications privilege protected confidences concerning the spouses' joint criminal activity, society views such communications as an abuse of the confidential relationship, and the privilege accordingly does not apply. Since joint criminal activity is likewise an abuse of the marriage relationship, the same rationale supports a joint participant exception to the testimonial privilege.

The court of appeals stated that it was reluctant to establish a joint participant exception because of "the difficulty often encountered in establishing the predicate without invading the privilege" (App., *infra*, 13a-14a (footnote omitted)). But courts have not encountered unmanageable difficulties in connection with the attorney-client privilege or the marital communications privilege and there is no reason to believe that a different result would obtain here. In the present case, the government's offer of proof regarding this issue, which was not contested by respondent in the initial district court proceedings, rested upon statements made to FBI agents by both respondent and her husband that established the spouses' joint participation in the espionage activities. See Nov. 29, 1984 Tr. 6 (sealed); Dec. 4, 1984 Tr. 19; see also pages 2-3, *supra*.

its decision cannot be justified by the privilege's contemporary rationale (cf. 445 U.S. at 52). Like the other testimonial privileges, the privilege against adverse spousal testimony must "take[] flight if the relation is abused" (*Clark* v. *United States*, 289 U.S. at 15), and the marital relation plainly is abused when it shelters a criminal partnership between husband and wife.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

ANDREW J. PINCUS
Assistant to the Solicitor General

BARRY A. BOHRER
Attorney

JUNE 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 969—August Term, 1984

Docket No. 85-1033

IN RE:

GRAND JURY SUBPOENA

UNITED STATES OF AMERICA, APPELLEE

HANA KOECHER, DEFENDANT-APPELLANT

(Submitted: Feb. 14, 1985 Decided: Feb. 28, 1985)

Before:

FRIENDLY, VAN GRAAFEILAND and WINTER, *Circuit Judges.*

FRIENDLY, *Circuit Judge*:

The criminal proceeding out of which this appeal arises had its origin in a complaint of Kenneth M. Geide, a Special Agent of the Federal Bureau of Investigation (FBI), charging Karl (in fact Karel) F. Koecher, with conspiring with other unnamed persons to communicate national defense documents and information to a foreign government in violation of 18 U.S.C. § 794(a) and (c). On November 27, 1984, Karel Koecher was arrested pursuant to a warrant. In an affidavit sworn to on the same day, Special Agent Geide alleged that Hana Koecher, Karel's wife, had participated with her husband in secret meetings with the intelligence service of the foreign government, had delivered classified United States national defense information obtained by Karel to agents of the foreign government intelligence service, had acted as a courier for that service, and had received payments from it for information and documents she had delivered. The affidavit also alleged that Hana was about to depart from the United States for Europe. A warrant issued for the detention of Hana as a material witness, and she was subpoenaed to appear before a grand jury that was investigating the complaint. She was asked certain questions, set forth in the margin, in regard to having done the acts alleged in the affidavit in support of the material witness warrant.[1] In response to each question, after consulting with her lawyer, she declined to answer

> on the ground that to do so could adversely affect the interest of my husband, Karl Koecher, and I might destroy the harmony of our 21 years of marriage. Also, the answer could violate the privilege against disclosure of confidential communications between my husband and me.

The Assistant United States Attorney advised her that in the Government's view the grounds stated did not justify her refusal to answer and asked whether there was any other ground for her refusal. After again consulting with her lawyer, Mrs. Koecher repeated the same formulation she had used before. The performance was repeated after Mrs. Koecher was warned that continued refusal to answer could result in the court's ordering her imprisonment under 28 U.S.C. § 1826(a). The grand jury authorized the United States Attorney to ask that she be held in civil contempt. At an adjourned hearing on December 4, 1984, Judge Palmieri overruled the claim of marital privilege, explaining his reasons in an oral opinion, and after proceedings not challenged for irregularity, ordered that Mrs. Koecher be committed to jail for a period of 18 months or for the life of the grand jury or until such time as she purged herself by answering the questions, whichever period was shortest. Mrs. Koecher appealed from that order. Judge Palmieri amplified his views in a thoughtful written opinion filed on December 11, 1984; the basis for his judgment was that the marital privilege was subject to an exception for joint participation in criminal activity, a view announced in *United States* v. *Van Drunen*, 501 F.2d 1393 (7 Cir.), *cert. denied*, 419 U.S. 1091 (1974); and followed in *United States* v. *Trammel*, 583 F.2d 1166 (10 Cir. 1978), *aff'd on other grounds*, 445 U.S. 40 (1980); and *United States* v. *Clark*, 712 F.2d 299 (7 Cir. 1983), but rejected by *Appeal of Malfitano*, 633 F.2d 276 (3 Cir. 1980).

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[1] Q. Mrs. Koecher, did you ever deliver classified information relating to the national defense of the United States to the Czechoslovakian Intelligence Service?

Q. Mrs. Koecher, have you ever received money from agents of the Czechoslovakian Intelligence Service as payment for information and documents that you delivered to them?

Q. Mrs. Koecher, have you ever met with agents of the Czechoslovakian Intelligence Service?

While the appeal was under advisement, the Government notified us, by letter dated December 20, 1984, that the grand jury had on that day filed a one-count indictment charging Karel F. Koecher with conspiring to violate 18 U.S.C. § 794(c) but that the grand jury was continuing an investigation, for which it believed Hana's testimony was critical, to develop the full scope of Karel's activities. Two of the overt acts in the indictment were that in the spring of 1975 Karel gave a package that concealed a classified document to Hana and instructed her to deliver it to the CIS and that Hana, pursuant to such instructions, had made such a delivery. Hana's counsel responded with a letter arguing that, with Karel now indicted, the Government was seeking to utilize the grand jury to prepare its case against Karel for trial, and requesting us to vacate the judgment of contempt on that ground. On December 28, 1984, we filed an unpublished order vacating the judgment of contempt without reaching the merits; the pertinent portion of this judgment is reproduced in the margin.[2]

Because of Judge Palmieri's unavailability to conduct the proceedings on remand, the matter was transferred to Judge Wyatt. On January 14, 1985, the Government submitted to him a letter of Assistant United States Attorney Green, a memorandum of law, and an affidavit of O.E. Kotlarchuk, a trial attorney of the Department of Justice. Copies of the two former were served upon counsel for Mrs. Koecher, but the latter was considered by the judge *ex parte.*[3]

Judge Wyatt filed an opinion on January 21, 1985. This recited that:

> The government has submitted *ex parte* an affidavit of a Trial Attorney in the Internal Security Section of the Criminal Division of the Department of Justice. This affidavit states that the affiant's Section supervises investigations and conducts prosecutions of cases concerning the national security. As disclosed by me to counsel for Hana, this affidavit states that the grand jury investigation continues after the return of an indictment against Karel for the purpose of con-

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[2] It is settled law that

> It is not permissible for the prosecutor to subpoena and question potential trial witnesses to an existing criminal proceeding where it is the sole or dominant purpose of such questioning to obtain evidence for use in the upcoming trial. Simply stated, it is not a legitimate function of the grand jury to serve as a substitute for pretrial discovery.

8 Moore's Federal Practice ¶ 6.04[5] at 6-86 (1984). *Accord,* 1 Wright Federal Practice and Procedure, Criminal 2d § 111.1 at 321 (1982). Decision whether this case falls within that principle depends on facts concerning the grand jury's investigation which were not pertinent at the time of Judge Palmieri's decision and are not before us. Accordingly we vacate the judgment of civil contempt, without considering whether it was properly issued on the facts then before the judge, and remand the case to the District Court for the Southern District of New York so as to enable Judge Palmieri to determine, as promptly as feasible, the issue raised by Karl F. Koecher's indictment. The Judge should also consider whether the particular questions asked by the Government which Mrs. Koecher refused to answer fall within the scope of the privilege, assuming that one exists. Meanwhile Mrs. Koecher will remain subject to the warrant of arrest as a material witness. This panel reserves jurisdiction.

[3] We have not read the affidavit or considered it except for Judge Wyatt's characterization of it. On the grounds on which we place decision it is not material.

> sidering whether other offenses than that in the one count indictment should be charged against him and whether charges should be made against potential defendants other than Karel.

More elaborately, on the basis of the affidavits in support of the applications for warrants to arrest Karel and Hana and in the testimony of Special Agent Geide before Magistrate Grubin during a bail hearing concerning Karel on December 4, 1984, he found as follows:

> Karel in Czechoslovakia was recruited in 1962 by the Czechoslovak Intelligence Service [CIS]. In the period 1963-65 he was trained and briefed to be sent to this country as an officer of the CIS.
>
> Karel was employed by the CIA for a period of time beginning in February 1973 and continuing until at least August 1975. He had access to classified documents and in the period stated passed to the CIS classified and other information and documents which he learned [of] or obtained by reason of his CIA employment.

Judge Wyatt concluded that "[c]onsidering the long period of time spent by Karel and Hana in this country on an admitted espionage mission for a foreign intelligence service, it would appear that the indictment against Karel barely scratches the surface." He thought it would be reasonable that the grand jury would wish to develop evidence that would support the indictment of additional conspirators and the inclusion of substantive counts. He therefore determined that "the sole or dominant purpose of further questioning of Hana by the government before the grand jury is not to obtain evidence for use at the trial of Karel on the one-count of the present indictment." The Government requested Judge Wyatt to issue a new judgment of contempt against Hana but the judge declined to do this, believing that he had no jurisdiction. Instead he directed the Government to transmit the record of the proceedings to this court. Accordingly, the Assistant United States Attorney forwarded to us a batch of papers including Judge Wyatt's opinion. After our informing counsel that we did not consider that anything was before us because we had vacated Judge Palmieri's order and Judge Wyatt had made none, further proceedings took place in the district court.

On January 30, 1985, Judge Wyatt heard argument on yet another motion by the Government for a judgment of contempt. He noted that he had received a letter from Mrs. Koecher saying that she would rather die in prison than give any testimony detrimental to her husband. In view of this he thought it would be a watse [*sic*] of time to have Mrs. Koecher appear again before the grand jury. He repeated the three questions, *see* note 1 *supra*, and Mrs. Koecher again refused to answer. He thereupon held her in contempt, implicitly adopting Judge Palmieri's views with respect to a joint participation exception to the marital privilege, and she has again appealed.

Appellant asks us to vacate the judgment of civil contempt on a number of grounds—(1) that the district court in effect found that Mrs. Koecher would never testify against her husband, (2) that Judge Wyatt erred in ruling that Mrs. Koecher's testimony was not being sought for the sole purpose of obtaining evidence against her husband, (3) that Mrs. Koecher was denied due process by having been refused access to her statements to the FBI which allegedly would demonstrate her inability to provide the information ostensibly sought by the Government,

(4) that the court should not recognize a joint participant exception to the marital privilege, and (5) that the Government has failed to establish a factual basis for the exception if one exists.

We find it unnecessary to decide any of these points except for the fourth, since we hold, in agreement with the Third Circuit and in conflict with the Seventh and Tenth Circuits, that the marital privilege is not subject to a joint participant exception.[4]

As explained in *Trammel* v. *United States*, 445 U.S. 40 (1980), the Court's latest relevant pronouncement on the subject, and elsewhere, "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience," F.R.E. 501, recognize two different testimonial privileges having their source in marriage. One, the privilege against disclosure of confidential communications between spouses, a privilege which can be invoked by either spouse, is not pertinent in this case since it was conceded in the district court and here that the questions involved no confidential communications, as the most cursory inspection of them makes apparent. The other, as now defined in *Trammel*, *supra*, vests a witness with a privilege not to testify adversely to a spouse; "the witness may be neither compelled to testify nor foreclosed from testifying." 445 U.S. at 53.

In ruling that Mrs. Koecher could nevertheless be compelled to testify, the district court followed decisions in the Seventh and Tenth Circuits making an exception for cases in which the spouses are joint

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[4] The Government does not dispute that the questions asked of Mrs. Koecher were within the marital privilege unless withdrawn therefrom by an exception for joint participation in crime.

participants in a criminal enterprise to which the questions relate. The explicit enunciation of the exception was in *United States* v. *Van Drunen*, 501 F.2d 1393, 1396 (7 Cir.), *cert. denied*, 419 U.S. 1091 (1974).[5] *Van Drunen* was accepted by the Tenth Circuit over a strong dissent in *Trammel*, 583 F.2d 1166 (1978), where, as in *Van Drunen*, the spouse testified voluntarily. When the Supreme Court came to decide *Trammel*, it made no mention of the ground on which the Court of Appeals had relied. It said that it had granted certiorari "to consider whether an accused may invoke the privilege against adverse spousal testimony so as to exclude the voluntary testimony of his wife," 445 U.S. at 41-42, and, answering that question in the negative by partially overruling *Hawkins* v. *United States*, 358 U.S. 74 (1958), affirmed the Court of Appeals, without reserving the question whether a joint participation exception would be recognized in a case where the witness-spouse claimed the privilege. The Seventh Circuit has continued to follow *Van Drunen* subsequent to the Supreme Court's decision in *Trammel*, *see United States* v. *Clark*, 712 F.2d 299 (1983), although, as in *Van Drunen*, the *Clark* decision also rested on the point that the facts about which the spouse's testimony was sought to be compelled antedated the marriage, 712 F.2d at 302. On the other hand, the Third Circuit, in a post-*Trammel* opinion, rejected the exception,

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[5] Since the witness-spouse apparently testified voluntarily, there would have been no need for the *Van Drunen* court to create the exception had it been able to foresee the Supreme Court's adoption of the rule announced six years later in *Trammel* that only the witness-spouse can claim the marital privilege. Additionally the joint enterprise exception was an alternative ground, the court also relying on the point that the testimony concerned events prior to the marriage.

Appeal of Malfitano, 633 F.2d 276 (1980). In *United States* v. *Archer*, 733 F.2d 354, 359 n.3, *cert. denied*, 105 S. Ct. 196 (1984), the Fifth Circuit stated that it had "not yet considered, and need not today, whether a 'joint crimes' exception . . . might limit the adverse spousal testimony rule in *Trammel*."

Appellant asks us to rule that *Trammel* rejected the joint participation exception. While we would have difficulty in going to that extreme, we nevertheless agree that the Supreme Court's action in *Trammel* has some negative implications as regards the joint participant exception. If the Supreme Court looked on the exception with favor, it is somewhat peculiar that it should not have decided the case on that ground rather than making the much broader assault upon the privilege involved in confining the privilege to the witness-spouse, thereby requiring a partial overruling of a decision little more than twenty years old. Also one would have expected the Court at least to have indicated that the exception might still make the privilege unavailable even when the witness-spouse asserted it.

A principal reason for the exception adopted in the *Van Drunen* opinion was that the goal of preserving the family "does not justify assuring a criminal that he can enlist the aid of his spouse in a criminal enterprise without fear that by recruiting an accomplice or co-conspirator he is creating another potential witness," 501 F.2d at 1396. Whatever the force of this argument when the Seventh Circuit decided *Van Drunen* and the Tenth Circuit decided *Trammel*, this rationale for the exception has been largely undermined by the Supreme Court's decision in *Trammel*. A person desiring to enlist the aid of his spouse as an accomplice cannot now be sure that he is not creating another potential witness; he takes the risk

that the spouse may choose to testify. A second reason offered in *Van Drunen*, that in circumstances of joint participation in crime the marriage is unlikely to be "an important institution contributing to the rehabilitation of the defendant spouse," 501 F.2d at 1397, does not strike us as especially forceful; rehabilitation had never been regarded as one of the interests served by the spousal privilege and, so far as it is a factor, participation in a joint crime would not necessarily remove the remorse which would trigger rehabilitation. We also are unable to accept the proposition that a marriage cannot be a devoted one simply because at some time the partners have decided to engage in a criminal activity. This is especially true with respect to political offenses, as witness some celebrated cases in this very court. In short, while it may well be that the marital privilege should be abolished, we do not see sufficient reason for creating a joint participation exception, particularly in the light of *Trammel*.

We do not mean that there is not something to be said on the other side. The Government relies on the well-recognized exception to the attorney-client privilege for communications made to an attorney for advancing criminal ends, *see, e.g., In re John Doe Corp.*, 675 F.2d 482, 491 (2 Cir. 1982), and, more particularly, on decisions of courts of appeals excepting from the confidential marital communication privilege statements made for such a purpose. The exception to the attorney-client privilege is rather easily distinguished. The attorney-client relationship, valuable as it is, is hardly of the same social importance as that of husband and wife. Here, as said in *Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965):

> We deal with a right of privacy older than the Bill of Rights . . . . Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.

With respect to the exception to the marital communications privilege, in none of the four cases cited by the Government, *United States* v. *Entrekin*, 624 F.2d 597, 598 (5 Cir. 1980), *cert. denied*, 451 U.S. 971 (1981); *United States* v. *Ammar*, 714 F.2d 238, 257-58 (3 Cir.), *cert. denied*, 104 S. Ct. 344 (1983); *United States* v. *Kapnison*, 743 F.2d 1450, 1455 (10 Cir. 1984); *United States* v. *Neal*, 743 F.2d 1441, 1446 (10 Cir. 1984), did the courts use the joint participation exception to force an unwilling spouse to testify concerning confidential marital communications, and the Tenth Circuit cases, *Kapnison* and *Neal*, carefully limited the exception to instances where the testimony is "by consent of the witness spouse." The Third Circuit perceives no contradiction between its holdings in *Malfitano, supra*, 633 F.2d at 280, that there is no exception to the general spousal privilege for criminal activity and in *Ammar, supra*, 714 F.2d at 257-58, "'that communications between spouses pertaining to ongoing or future criminal activity, are not protected against disclosure by the privilege for confidential marital communications."[6] The *Ammar* court saw a difference between

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[6] Other cases cited by the Government, *United States* v. *Kahn*, 471 F.2d 191 (7 Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); *United States* v. *Mendoza*, 574 F.2d 1373 (5 Cir.), *cert. denied*, 439 U.S. 988 (1978); *United States* v. *Bromme*,

the rationales underlying the confidential communications privilege and the adverse spousal testimony privilege. The former seeks to protect the intimacy of private marital communications and courts have concluded that discussions of criminal activity can be excluded from that protection. *See, e.g., United States* v. *Kahn*, 471 F.2d 191, 194 (7 Cir. 1972), *cert. denied*, 411 U.S. 986 (1973). The latter is more broadly aimed at protecting marital harmony and the Third Circuit reasoned that compelling a spouse to testify under a joint participants exception could create exactly the negative impact on the marriage that the privilege was designed to avoid. *See Malfitano, supra*, 633 F.2d at 279 n.5.

Another factor inclining us to reject a joint participation exception to the spousal privilege is the difficulty often encountered in establishing the predi-

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732 F.2d 363 (4 Cir.), *cert. denied*, 105 S. Ct. 181 (1984); *United States* v. *Shipp*, 578 F. Supp. 980 (S.D.N.Y. 1984), involved the admission of out-of-court statements made by a spouse to a third party or over a tapped telephone. Accordingly, in none of these cases was the court faced with the spectacle of a witness being compelled by the government actually to testify against her spouse. Moreover, the admission of the spouse's adverse statements through the testimony of a third party witness or through tapes of intercepted conversations was thought to reduce the danger of generating marital friction by providing a "convenient buffer" between the spouse and the damaging testimony. *See, e.g., United States* v. *Mackiewicz*, 401 F.2d 219, 225 (2 Cir.), *cert. denied*, 393 U.S. 923 (1968). Where the spouse is not a witness, and the testimony recounts statements made to third parties or in furtherance of the joint criminal enterprise, the non-witness spouse would have to possess undue sensitivity to allow a marriage to be impaired by the admission of the evidence. *See United States* v. *Price*, 577 F.2d 1356, 1365 (9 Cir. 1978), *cert. denied*, 439 U.S. 1068 (1979).

cate without invading the privilege.[7] This case is a good example. There is, to be sure, basis for a reasonable inference from the Koechers' alleged training in Czechoslovakia and their long life together in the United States, where Karel was employed by the CIA, to a conclusion that Hana was aware of what Karel was doing. However, the Government has made no criminal charges against Hana, and her counsel alleges that in long interviews by the FBI she asserted that Karel kept his doings to himself.

The marital privilege rests upon "its perceived role in fostering the harmony and sanctity of the marriage relationship," *Trammel*, 445 U.S. at 44, *see also id.* at 53, and the "*natural repugnance* in every fair-minded person to compelling a wife or husband to be the means of the other's condemnation, and to compelling the culprit to the humiliation of being condemned by the words of his intimate life partner," 8 Wigmore, *Evidence* § 2228 at 217, (emphasis in original),[8] forced from her by governmental compulsion. In light of its existence since the early days of the common law and of the importance of the interests which the marital privilege serves, we would leave the creation of exceptions to the Supreme Court or to Congress.

We therefore vacate the order finding Mrs. Koecher in contempt. Issuance of the mandate is stayed pending the disposition of a timely petition for rehearing by the Government and, if such a petition is not

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[7] As Chief Judge Seitz observed in *Appeal of Malfitano*, *supra*, 633 F.2d at 279: "Ironically, the closer the marriage, the more likely it will appear that both spouses are involved."

[8] Although Wigmore characterizes this argument as "the real and sole strength of the opposition to abolishing the privilege," *id.*, he rejects it.

timely filed or is denied, for an additional fourteen days to permit the filing of a petition for certiorari and a motion for a stay and, if such a motion is filed, pending the disposition thereof.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 84-1428

In Re:

Grand Jury Subpoena
United States of America, appellee
-against-
Hana Koecher, defendant-appellant

[Filed Dec. 28, 1984]

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of December, one thousand nine hundred and eighty-four.

PRESENT:

Honorable Henry J. Friendly,
Honorable Ellsworth A. Van Graafeiland,
Honorable Ralph K. Winter,
Circuit Judges.

This appeal from an order of Judge Palmieri, in the District Court for the Southern District of New York, finding Hana Koecher guilty of civil contempt for having refused, on the ground of marital privilege, to answer certain questions before a grand jury investigating a complaint by the United States charging her husband, Karl F. Koecher, with violating 18 U.S.C. § 794(a), came on for hearing on December 19, 1984, and was taken under advisement.

By letter dated December 20, 1984, the United States Attorney advised us that the Grand Jury had filed an indictment against Karl F. Koecher charging violation of 18 U.S.C. § 794(c); the letter stated that

> There is, however, a continuing grand jury investigation for which we believe Mrs. Koecher's testimony is critical to develop the full scope of Karl Koecher's criminal activities.

By letter also dated December 20, 1984, Michael Kennedy, Esq., attorney for Mrs. Koecher, contended that, as a result of the indictment, any need for Mrs. Koecher's testimony had disappeared. The letter noted the Government's failure to represent that it was "considering additional charges against Mr. Koecher or charges against other individuals," and asked us to vacate the judgment of contempt on the ground urged in the letter as well as on the ground presented at the argument.

It is settled law that

> It is not permissible for the prosecutor to subpoena and question potential trial witnesses to an existing criminal proceeding where it is the sole or dominant purpose of such questioning to obtain evidence for use in the upcoming trial. Simply stated, it is not a legitimate function of the grand jury to serve as a substitute for pretrial discovery.

8 Moore's Federal Practice ¶ 6.04[5] at 6-86 (1984). *Accord,* 1 Wright Federal Practice and Procedure, Criminal 2d, § 111.1 at 321 (1982). Decision whether this case falls within that principle depends on facts concerning the grand jury's investigation which were not pertinent at the time of Judge Palmieri's decision and are not before us. Accordingly we vacate the judgment of civil contempt, without considering whether it was properly issued on the facts then before the judge, and remand the case to the District Court for the Southern District of New York so as to enable Judge Palmieri to determine, as promptly as feasible, the issue raised by Karl F. Koecher's indictment. The Judge should also consider whether the particular questions asked by the Government which Mrs. Koecher refused to answer fall within the scope of the privilege, assuming that one exists. Meanwhile Mrs. Koecher will remain subject to the warrant of arrest as a material witness. This panel reserves jurisdiction.

/s/ Henry J. Friendly
HENRY J. FRIENDLY
U.S.C.J.

/s/ Ellsworth A. Van Graafeiland
ELLSWORTH A. VAN GRAAFEILAND
U.S.C.J.

/s/ Ralph K. Winter
RALPH K. WINTER
U.S.C.J.

N.B. *Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.*

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M 11-188

IN RE: HANA KOECHER
A witness before the Grand Jury.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Before:
HON. INZER B. WYATT,
District Judge.

New York, N. Y.
January 30, 1985
10:30 a.m.

APPEARANCES:

RUDOLPH W. GIULIANI, United States Attorney for the Southern District of New York;

By: BRUCE GREENE, Assistant United States Attorney

-and-

IHOR O. E. KOTLARCHUK, Trial Attorney, U.S. Department of Justice.

MICHAEL KENNEDY and
JOSEPH CALLUORI, Attorneys for Witness.

* * * *

THE COURT: Mrs. Koecher, it is my duty in view of your refusal, your statement that you would continue to refuse to answer the three questions which I put to you if you were asked those questions before the grand jury, and that you would refuse for the reasons that Mr. Kennedy has stated and that you have said is your answer and refusal, I find on the basis of that refusal that it is my duty to hold you in contempt of Court and to commit you to imprisonment for a period of 18 months, or for the life of the grand jury, or until such time as you answer the questions and thus purge your contempt, whichever period is shorter, and I will prepare and sign a written order as soon as I can.

* * * *

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M 11-188 (IBW)

IN RE: GRAND JURY SUBPOENA

HANA KOECHER

[Filed Jan. 30, 1985]

ORDER

HANA KOECHER, having been called as a witness before a Grand Jury of the United States, to wit, the September 1983 Additional Grand Jury for the Southern District of New York, and having refused without just cause to comply with an order of Judge Palmieri of this Court made on December 4, 1984, requiring her to testify and provide other information to the Grand Jury, and such refusal having been duly brought to the attention of this Court, and having been repeated in the presence of this Court, and

Judge Palmieri, having filed on December 4, 1984, an order under 28 U.S.C. § 1826(a) committing her for confinement until such time as she is willing to give such testimony and provide such information; and

HANA KOECHER, having filed a notice of appeal to the Court of Appeals from said order of this Court filed December 4, 1984, and the matter having been argued before the Court of Appeals on December 19, 1984; and

the Court of Appeals on December 28, 1984, having made and filed an order remanding the case to this Court (among other things) for a determination to be made as directed in the order "as promptly as feasible", vacating the order of this Court filed December 4, 1984, and directing that HANA KOECHER remain subject to the warrant of arrest as a material witness; and

Judge Palmieri having been then absent from the District and the matter having been transferred to me on January 11, 1985, by my consent under Rule 16 of the Rules of this Court for the Division of Business Among District Judges; and

the determination directed by the Court of Appeals having been made and filed on January 21, 1985; and

HANA KOECHER, having appeared before me on January 30, 1985, and having been asked at that time whether, if she were returned to the September 1983 Additional Grand Jury for the Southern District of New York and asked the three questions which had originally been propounded to her on November 29, 1984, which were read to her by me on January 30, 1985, and which I informed her she was required to answer, she would refuse to answer each question, and having replied that she would refuse to answer said questions; it is hereby

ORDERED, pursuant to Title 28, United States Code, Section 1826(a), that the said HANA KOECHER be confined at a suitable place, including but not limited to the Metropolitan Correctional Center in New York, New York, until such time as HANA KOECHER is willing to give such testimony

and provide such information as she on January 30, 1985, refused to give and provide; and is further

ORDERED, that the period of such confinement shall not exceed the life of the term of the September 1983 Additional Grand Jury, including extensions, and shall not in any event exceed eighteen months.

/s/ Inzer B. Wyatt
INZER B. WYATT
United States District Judge

New York, New York
January 30, 1985

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M 11-188 (IBW)

In re: Grand Jury Subpoena
Hana Koecher

[Filed Jan. 21, 1985]

DETERMINATION ON REMAND FROM THE COURT OF APPEALS

This matter is presently before this Court on remand from the Court of Appeals by an order filed on December 28, 1984. The remand was in an appeal (No. 84-1428) by Hana Koecher from an order of Judge Palmieri filed December 4, 1984, committing her for confinement for civil contempt of court for refusal to testify and provide other information to the Grand Jury.

1.

The matter was before Judge Palmieri under circumstances to be hereafter related. On the day the remand order was filed Judge Palmieri left this District and is still absent. When he learned of the remand for a determination "as promptly as feasible", Judge Palmieri, by telephone on January 10, arranged to transfer the matter to me on consent under Local Rule 16 for the Division of Business Among District Judges. Written advice to the Assignment Committee was given on January 11 and due notice given to counsel for the government and for Hana.

2.

This matter arises out of the arrest on November 27, 1984 of Karl F. Koecher and Hana, his wife. (It appears that in nearly all the papers the first name of Mr. Koecher has been written "Karl" but that he spells his first name "Karel". The latter spelling will be used hereafter.) Karel was arrested on a warrant issued on the same date by Magistrate Buchwald based on a complaint charging violation of 18 U.S.C. § 794(a) and (c). The charge was that Karel had been trained and briefed by the Czechoslovak Intelligence Service ("CIS") and sent to this country with his wife as an officer of the CIS, that on instructions from the CIS he penetrated our Central Intelligence Agency ("CIA") and was employed there for a period, and that he obtained at CIA classified information which he passed on unlawfully to the CIS. Hana was also arrested on November 27, 1984, on a warrant issued by Magistrate Buchwald for her as a material witness in the criminal proceeding against Karel. The warrant was based on an affidavit by Special Agent Geide of the Federal Bureau of Investigation.

3.

On the afternoon of November 29, Hana appeared in response to a subpoena before the September 1983 Additional Grand Jury. She then refused to answer three questions put to her by the Assistant United

States Attorney, Mr. Green. She was allowed privately to consult her counsel, Mr. Kennedy, who was just outside the Grand Jury room. Her refusal was based on the assertion of a claimed privilege as the wife of Karel.

After her refusal to answer the three questions, in response to instructions from the grand jury, Hana appeared with Assistant United States Attorney Green on the same afternoon before Judge Palmieri who was then sitting in Part I of this Court. The government moved that the privilege be denied to exist because the spouses were co-conspirators in a criminal venture, that Hana be directed to answer the three questions, and that she be held in contempt for refusal to answer.

The question of the existence of the privilege claimed was argued by both sides, after which Judge Palmieri reserved decision and the proceedings were adjourned to Tuesday, December 4.

On December 4, Judge Palmieri made his decision in open Court, denying the existence of a spousal privilege where the spouses were engaged in a joint criminal enterprise. Hana then continued her refusal to answer the three questions, whereupon Judge Palmieri held her in contempt of court and committed her to imprisonment for 18 months or for the life of the grand jury or until she answered the questions, whichever period is shorter. A written order by Judge Palmieri to this effect was filed on the same day.

On December 7, a notice of appeal was filed for Hana.

On December 11, Judge Palmieri filed an opinion which explained and amplified the oral ruling which he had made on December 4.

4.

On December 19, the appeal of Hana was argued before the Court of Appeals (Friendly, Van Graafeiland, Winter, CJJ.).

5.

On December 20, the grand jury returned a one-count indictment against Karel (84 Crim. 1001 (SWK)), now assigned to Judge Kram for trial. The charge is that Karel, in violation of 18 U.S.C. § 794(c), conspired "with others known and unknown to the Grand Jury" to violate 18 U.S.C. § 794(a). The conspiracy is averred to have been in the period December 1, 1965 to November 1984 and to have been in this District and elsewhere. The overt acts are averred to have been done in the Spring of 1975 and one of them is averred to have been done by Hana by delivering, on instructions of Karel, a classified document to the Czechoslovak Intelligence Service. Presumably Hana is one of the co-conspirators "known" to the grand jury.

On the day the indictment against Karel was returned, the government addressed a letter to the panel of the Court of Appeals advising of that fact. The letter added that there was "a continuing grand jury investigation for which we believe Mrs. Koecher's testimony is critical to develop the full scope of Karl Koecher's criminal activities".

Counsel for Hana also sent a letter to the panel. This letter is dated December 20 but must have been written very late on that day since it refers to the public announcement of Karel's indictment as having been made on "Thursday evening, December 20". In any event, the letter asked that, by reason of the indictment of Karel, the Court of Appeals "vacate the judgment of contempt" against Hana. The letter asserted, among other things, that "the Government does not now need and, indeed, has never needed the testimony of Hana Koecher". The letter also stated that the government "cannot use the grand jury to prepare its case for trial" and emphasized that the government's letter had not stated that the government was "considering additional charges against Mr. Koecher or charges against other individuals".

On December 28, the Court of Appeals filed its order. That order referred to the conflicting views of counsel as to the propriety of continued questioning of Hana before the grand jury. The order vacated this Court's judgment of civil contempt against Hana, directed that she be held under the warrant of arrest as a material witness, and remanded the case to this Court for a prompt determination of the following two issues (as I understand the order):

(a) whether the sole or dominant purpose of further questioning of Hana by the government before the grand jury is to obtain evidence for use at the trial of Karel on the one count of the present indictment; and

(b) whether the three questions already asked Hana before the grand jury fall within the scope of the spousal privilege, assuming that one exists.

6.

By January 10, 1985, Judge Palmieri, being then out of the District, had learned of the order of the Court of Appeals. There was a telephone conference call on January 10 between Judge Palmieri, Assistant United States Attorney Green, and Mr. Calluori, of counsel to Hana. A stenographic record of this conference call was made. Judge Palmieri, among other things, fixed a time schedule for submission of papers by the parties, stated that he could not at that time pass upon the propriety of the government making a submission *ex parte* but "was inclined to believe that it is proper", and advised counsel that, in view of the expedition desired by the Court of Appeals and of his absence, he felt obliged to find another judge "to accept the burden of continuing with the responsibilities of this case".

Judge Palmieri through his chambers then asked me to accept transfer of the case. I then spoke to Judge Palmieri by telephone, agreed to the transfer and on January 11, the administrative steps for the transfer were completed.

7.

Under the schedule fixed by Judge Palmieri, the government's submission was due on Tuesday, January 15. The government delivered its submission on Monday afternoon, January 14; this consisted of a letter of Mr. Green, a memorandum of law, and an affidavit sworn to on January 14 of Ihor O.E. Kotlarchuk, a Trial Attorney of the Department of Justice. Copies of the letter and of the memorandum of law were given to counsel for Hana, but no copy of the affidavit. That was given to me to read by James Londergan, court security officer under the Classified Information Procedures Act (18 U.S.C. Appendix III; "CIPA"). The affidavit was submitted to me by the government *ex parte* and has remained in the custody of Mr. Londergan, available from him to me for examination as required. I was told by Mr. Green of Mr. Londergan's office and responsibility; I am not clear by whom he was appointed but it may well have been by Judge Kram, to whom the indictment of Karel was assigned for trial.

After the submission of papers for the government was complete, I asked Mr. Green and Mr. Calluori to meet with me on Tuesday afternoon, January 15. We did meet then; Mr. Kotlarchuk was present with Mr. Green.

At the January 15 conference, counsel on both sides agreed with the Court that the two issues to be determined by this Court on remand are as already stated hereinabove at the end of Section 5. (The memorandum of law later submitted for Hana on January 16 may to some extent be inconsistent.)

At the January 15 conference, counsel for Hana objected to the *ex parte* submission by the government but, in reliance on *In re John Doe Corp.*, 675 F.2d 482, 489-91 (2d Cir. 1982), and other cases, I ruled that the *ex parte* submission was proper under the circumstances, but made such disclosure to counsel for Hana of the purpose of the submission as seemed reasonable.

At the January 15 conference, counsel for Hana stated that "full papers" for her could be submitted by Thursday morning, January 17, and that the matter of the determination on remand could be argued at that time "on the basis of full submissions by all counsel". Mr. Green being in agreement with this, it was, in effect, so ordered. On Wednesday evening, January 16, counsel for Hana submitted at my chambers a memorandum of law.

8.

By agreement of counsel for the parties, they were heard in final argument and submission on Thursday morning, January 17. At that time there also appeared, Robert G. Fierer, Esq., and Steven A. Westby, Esq. of Atlanta, Georgia, of counsel for

Karel. They presented a motion to intervene on behalf of Karel in this proceeding and a motion to quash the grand jury subpoena directed to Hana and these motions have since been filed in the Clerk's office. There is some question in my mind whether it is appropriate for me to entertain these motions, in view of the appeal of Hana presently pending in the Court of Appeals except for the remand for the limited purpose described in the Court of Appeals order. I conclude, however, that in the interest of simplicity and expedition the motions should be entertained. By separate orders being filed this date, the motion to intervene is being granted (the government does not oppose) and the motion to quash the subpoena is being denied.

Mr. Fierer, at the hearing on January 17, was heard as counsel for Karel, in respect of the determination on remand and also in respect of the two motions above described.

At the end of the hearing on January 17, the determination on remand was taken under advisement. This is now that determination.

9.

The second of the two issues directed by the Court of Appeals to be determined on remand may be determined first because it is simple and there is no dispute between the government and counsel for Hana as to the proper determination to be made.

The second issue, to quote the order of the Court of Appeals, is "whether the particular questions asked by the Government which Mrs. Koecher refused to answer fall within the scope of the privilege, assuming that one exists".

The spousal privilege was thus described by Judge Palmieri (opinion filed December 11, 1984 at p. 2, fn. 1):

> "The Federal courts recognize two common law privileges arising from the marital relationship. The first concerns the disclosure of confidential marital communications. The second, a testimonal privilege, permits one spouse to refrain from testifying adversely against the other."

It was conceded by counsel for Hana and by the government before Judge Palmieri "that the questions before the grand jury involved no confidential communications between husband and wife" (the same opinion, p. 2).

This narrows the issue before me to the following: could the answers to the questions asked Hana before the grand jury be "potentially adverse to her husband"? (the same opinion, p. 2).

Counsel for Hana and for the government agreed before me that this was the issue to be here determined, that the answers of Hana to the questions asked her could be potentially adverse to her husband, and that if there is a spousal privilege here, the questions already asked fall within it (transcript, January 15, 1985 hearing, p. 5).

Even absent an agreement of the parties, I would without hesitation conclude that the answers of Hana could be potentially adverse to her husband. A comparison of the indictment of Karel with the questions asked of Hana before the grand jury compels that conclusion.

The indictment charges Karel with conspiracy to deliver to the Czechoslovak Socialist Republic information relating to the national defense. Three overt acts are charged: that Karel removed a classified document from the CIA, that he gave such a document to Hana, and that she in fact delivered such a document to CIS. The questions asked her before the grand jury, while not confined to these charges, are certainly relevant to them.

I therefore find and determine that the questions asked Hana by the government before the grand jury on November 29, 1984, which she refused to answer, called for answers which would be potentially adverse to her husband and which thus fall within the privilege, assuming that one exists.

10.

We now come to the first issue directed by the Court of Appeals to be determined on remand. About this issue there is sharp controversy. This issue is the following: is the sole or dominant purpose of further questioning of Hana by the government to obtain evidence for use at the trial of Karel on the one-count of the present indictment?

The parties have discussed at some length the burden of persuasion on this issue but have cited no case in this Circuit on the point. It seems to me that the generally accepted rules are that in the absence of a contrary factual showing grand jury proceedings are presumed to be lawful and regular; and that the burden of persuasion is on a resisting grand jury witness. The Third Circuit in *In re Grand Jury Proceedings*, 632 F.2d 1033, 1041 (1980), stated that "the burden is his [the indicted defendant or resisting grand jury witness] to demonstrate that the sole or dominant purpose of seeking the evidence post indictment is to prepare for the pending trial". *See also United States v. Gibbons*, 607 F.2d 1320, 1328 (10th

Cir. 1979); *United States v. Woods*, 544 F.2d 242, 250 (6th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

The objecting witness Hana has made no factual showing of irregularity. Her chief argument—mistaken, according to authority just cited—is simply that the government has the burden of proof.

The government has submitted *ex parte* an affidavit of a Trial Attorney in the Internal Security Section of the Criminal Division of the Department of Justice. This affidavit states that the affiant's Section supervises investigations and conducts prosecutions of cases concerning the national security. As disclosed by me to counsel for Hana, this affidavit states that the grand jury investigation continues after the return of an indictment against Karel for the purpose of considering whether other offenses than that in the one count indictment should be charged against him and whether charges should be made against potential defendants other than Karel.

In this connection, it may be noted that there appear to be no statute of limitations problems barring the grand jury from making further charges under 18 U.S.C. § 794 against Karel or against other defendants. Violations of 18 U.S.C. § 794 are capital offenses, for which there is no period of limitations. 18 U.S.C. § 3281. Account may be taken of *Furman v. Georgia*, 408 U.S. 238 (1972), but the reasoning of Judge Stewart in *United States v. Provenzano*, 423 F. Supp. 662, 664-66 (S.D.N.Y. 1976), *affirmed*, 556 F.2d 562 (2d Cir. 1977), is persuasive that 18 U.S.C. § 3281 will continue to apply and that violations of 18 U.S.C. § 794 are subject to no time limitations.

Wherever the burden may lie on the issue before me and without regard to the *ex parte* affidavit, the record in my view establishes that the continued grand jury investigation after the return of the indictment of Karel is not solely or predominantly for the purpose of obtaining evidence for use at the pending trial of that indictment. The *ex parte* affidavit furnishes additional support for this conclusion.

11.

The background of the grand jury investigation appears in the affidavits submitted in support of the application for warrants to arrest Karel and Hana (which are of public record), and in the testimony of Special Agent Geide before Magistrate Grubin on December 4.

Karel in Czechoslovakia was recruited in 1962 by the Czechoslovak Intelligence Service. In the period 1963-1965 he was trained and briefed to be sent to this country as an officer of the CIS. He and Hana came here on December 5, 1965, apparently on a visa for permanent residence. Karel had been instructed by the CIS to get inside our Central Intelligence Agency (CIA) and was able by February 1973 to secure employment at the CIA. Hana was present at a secret meeting in Czechoslovakia in September 1963 at which time she and Karel were both instructed to penetrate United States intelligence agencies. In 1971 they were naturalized as citizens of the United States.

Karel was employed by the the CIA for a period of time beginning in February 1973 and continuing until at least August 1975. He had access to classified documents and in the period stated passed to the CIS classified and other information and documents which he learned or obtained by reason of his CIA employment. Specifically, in 1975 Karl removed a four-page document from the CIA classified "Secret", made a copy and gave it to a woman for secret delivery to the CIS. It was so delivered secretly to the CIS.

Hana acted as a courier for the CIS in the United States from 1974 to 1983. Karel and Hana had several secret meetings between 1962 and 1983 in New York, Vienna, and Czechoslovakia and received instructions as to their activities with United States intelligence agencies. Between 1975 and 1983 Hana received money from agents of the CIS in exchange for delivery to them of information and documents.

The FBI learned that Karel and Hana were planning to move their permanent residence to Austria at the end of November 1984. It was for this reason that they were arrested on November 27, 1984.

There has been no challenge by counsel for Hana to the foregoing background facts. No issue of fact has been raised.

12.

Considering the long period of time spent by Karel and Hana in this country on an admitted espionage mission for a foreign intelligence service, it would appear that the indictment against Karel barely scratches the surface. It is a one-count indictment charging a conspiracy against one person. It avers that there are known (among them, presumably Hana) and unknown co-conspirators. There are no substantive counts. It appears, however, that Karel had access to classified documents and information at the CIA, that he passed to the CIS "virtually any" information and documents obtained or learned from the CIA, that Hana acted as courier for the CIS between 1974 and 1983, that she delivered "classified information relating to the national defense" to the CIS in 1974 and 1975, that between 1975 and 1983

she received money from agents of the CIS for information and documents delivered to them, and that she had "several" secret meetings with agents of the CIS here and in Europe. It would seem reasonable and logical that the government and the grand jury would wish to know—among other things—who helped Karel at the CIA to obtain documents and information, who helped Karel otherwise in his unlawful acts, who were the CIS agents to whom Karel delivered documents or information, who were the CIS agents who paid Hana money, who were the CIS agents with whom Karel and Hana met secretly here in New York and in Europe, and what documents and information were delivered by Karel and Hana to the CIS. These are among the many matters about which the grand jury would naturally inquire in considering other charges against Karel and whether to indict other persons. It would be normal and reasonable to include a number of substantive counts in the indictment and the grand jury would wish to select for this purpose the more significant of the documents and information transmitted by Karel and Hana.

13.

It is argued for Hana that "there has been no showing that she is a 'joint participant'" (Memorandum, p. 2). This is not an argument properly addressed to me, as I understand the terms of the remand. In any event, the indictment returned against Karel itself appears to answer the argument; the indictment avers that one of the overt acts was committed by Hana, thus evidencing probable cause to believe that she was a co-conspirator; an "overt act" is one performed by a co-conspirator, not by an innocent person. Moreover, the affidavit for the warrant of arrest of

Hana shows probable cause that she participated in a joint criminal enterprise.

14.

It is argued for Hana that only the three questions already asked her may be considered in making this determination on remand, that these questions are relevant to the present indictment against Karel, and that the government's *sole* purpose in asking them is to prepare for trial of the present indictment. Counsel for Hana, with no support in fact, assert (Memorandum, p. 11) that the questions already asked Hana "are not designed nor intended to elicit evidence about other crimes or other persons not alleged or named in the indictment". The questions do not themselves suggest that they refer only to the one delivery by Hana in 1975 set out as an overt act averred in the indictment. On the contrary, it may be more readily inferred that if her answers to any of these questions is "Yes", there will be further questions as to when, with whom, how many times, etc., to develop the full history.

15.

Counsel for Hana conclude their submission of law points (p. 15) by asking that this Court "decline to order Hana Koecher to answer questions propounded to her by the grand jury on November 29, 1984". This is not my understanding of the task set by the Court of Appeals. Whether to order Hana to answer the pending questions will be decided by the validity of Hana's assertion of the claimed privilege, a matter on which Judge Palmieri has ruled and which has been heard by the Court of Appeals. My task, as earlier expressed, is only to make the determinations ordered by the Court of Appeals.

16.

A responsible officer of the Department of Justice, familiar with this matter, has made an affidavit that the purpose of post-indictment questioning of Hana before the grand jury is to further investigation by the grand jury of other offenses by Karel and offenses by persons other than Karel. No factual showing has been made by Hana in reply. I find nothing in the record which would cast any doubt on the purpose as declared by the government. On the contrary, the declared purpose of the grand jury investigation seems the normal and logical course which an alert and conscientious grand jury and prosecutor would follow.

I therefore find and determine that the sole or dominant purpose of further questioning of Hana by the government before the grand jury is not to obtain evidence for use at the trial of Karel on the one-count of the present indictment.

/s/ Inzer B. Wyatt
INZER B. WYATT
United States District Judge

January 21, 1985

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M 11-188 (ELP)

IN RE: GRAND JURY SUBPOENA
HANA KOECHER

OPINION

PALMIERI, J.:

Hana Koecher is being detained as a material witness in a prosecution of her husband Karl F. Koecher for acts of foreign espionage in violation of Sections 794(a) and (c) of 18 United States Code entitled "Gathering or Delivering Defense Information to Aid Foreign Government."

A criminal complaint filed against him on November 27, 1984 resulted in his arrest and incarceration without bail. No charges have been filed against Hana Koecher. She appeared before a grand jury sitting in this district as a subpoenaed witness on November 29, 1984. After being advised of her constitutional rights, Mrs. Koecher was asked a number of questions concerning her activities which were plainly material to the investigation of which her husband was the target. She steadfastly refused to answer any of the questions asserting, after consulting with counsel, her marital privileges against disclosure of confidential communications with her husband and the giving of testimony potentially adverse to the interests of her husband.[1]

On November 30, 1984, the United States Attorney for this district moved this Court for an an order directing Mrs. Koecher to testify notwithstanding her claims of privilege. It was conceded by both sides at the hearing before this Court that the questions before the grand jury involved no confidential communications between husband and wife so that the sole issue here is whether Mrs. Koecher can validly assert her marital disqualification to testify with respect to her actions at a period of time when her husband was allegedly involved in espionage activity on behalf of the Czechoslovakian intelligence apparatus.

The issue squarely presented is whether Hana Koecher can be compelled to give testimony potentially adverse to her husband despite her claimed disqualification.[2] At a hearing before this Court on December 4, 1984, this Court explained its grounds for holding that her claim of privilege was invalid. The basis for this decision was, essentially, that the testimonial disqualification sought by Mrs. Koecher should not be permitted to stand as a bar to testimony concerning a joint criminal enterprise in which a husband and wife are allegedly both engaged.[3] In the face of reiterated refusal to answer the questions put to her before the grand jury, Mrs. Koecher was thereupon held to be in civil contempt of the Court in violation of 28 U.S.C. § 1826 and committed to jail for a period of 18 months or for the life of the grand jury or until such time as she decided to answer the questions, whichever period was shorter. She has remained committed since December 4, 1984.

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[1] Under Fed.R.Evid. 501, federal privilege law applies in criminal cases. The Federal courts recognize two common law privileges arising from the marital relationship. The first concerns the disclosure of confidential marital communications. The second, a testimonial privilege, permits one spouse to refrain from testifying adversely against the other.

[2] The privilege against adverse spousal testimony is applicable in proceedings before the grand jury to the same extent that it is applicable in a criminal trial in federal court. *See, e.g., United States* v. *Calandra*, 414 U.S. 338, 346 (1974); *Blau* v. *United States*, 340 U.S. 332 (1951); *Appeal of Malfitano*, 633 F.2d 276 (3d Cir. 1980); Fed.R.Evid. 1101(d)(2).

The discussion which follows is intended to explicate and amplify the oral ruling already referred to. The law regarding the privilege against adverse spousal testimony is unclear. Two Supreme Court decisions since 1958 have dealt with the privilege, but neither decision provides an unequivocal answer to the question facing this Court. The decisions in the Second Circuit similarly yield no clear guidance. The circuits that have addressed the privilege against adverse spousal testimony have reached differing conclusions. For this reason, a brief review of the relevant jurisprudence is necessary.

I *The Supreme Court Decisions*

The common law rule regarding the marital testimonial privilege has an ancient and fascinating lineage. The development of the privilege has been extensively discussed by the Supreme Court in *Hawkins v. United States*, 358 U.S. 74 (1958), and *Trammel v. United States*, 445 U.S. 40 (1980), and need not be treated in detail in this opinion.

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[3] The government has made an offer of proof concerning the alleged joint criminal enterprise between Karl and Hana Koecher. See Government's Memorandum of Law, Exhibits A (Affidavit in Support of Material Witness Warrant) and B (Complaint).

The *Hawkins* case involved the conviction of a husband for a Mann Act violation. His wife had testified voluntarily against him over his objection. The Supreme court reversed the conviction holding that the privilege against adverse spousal had been violated. In effect, the *Hawkins* decision permitted the accused to exclude all adverse spousal testimony. Over twenty years later, the Supreme Court again addressed the claim of spousal privilege in the *Trammel* case and modified the *Hawkins* rule. The *Trammel* case concerned a husband and wife who had been jointly engaged in the illegal importation of heroin. At the husband's trial, the wife—an unindicted co-conspirator—voluntarily testified against her spouse. The 10th Circuit Court of Appeals affirmed the defendant-spouse's conviction holding that where a husband and wife were joint participants in criminal activities and where the wife gave incriminating testimony at trial under a grant of immunity, the privilege against adverse spousal testimony does not bar the witness-wife's testimony.[4] 583 F.2d 1166 (10th Cir. 1978). The Supreme Court affirmed the conviction—but on a different theory. The Court ignored the "joint participants" theory articulated by the circuit court, and instead limited its holding to vesting the right to assert the privilege solely in the witness-spouse. In reaching this conclusion, the Supreme Court stated that testimonial exclusionary rules and privileges "must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth'." *Trammel*, 445 U.S. at 50 (quoting *Elkins* v. *United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J. dissenting). A careful reading of the Court's opinion reveals the "discomfort" with which the Court viewed the privilege. *In re Grand Jury Matter*, 673 F.2d 688, 697 (3rd Cir.), *cert. denied, sub nom., United States* v. *Doe*, 459 U.S. 1015 (1982) (Adams, J. dissenting). The Court reviewed the sharp criticism directed towards the privilege against adverse spousal testimony (*Trammel*, 445 U.S. at 44-45[6]) and the steady erosion of the privilege both in state jurisdictions (*Id.* at 48-49, nn. 9-10) and in the federal courts (*Id.* at 46 n.7). It noted that Fed.R.Evid. 501,

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[4] On appeal, the government did not argue that a grant of immunity had to be involved. The government argued that joint participation in criminal activity was sufficient to justify an exception to the privilege against adverse spousal testimony. *See* Brief for Respondents at 2, 8 and 25-29.

> "acknowledges the authority of the federal courts to continue the evolutionary development of testimonial privileges in federal criminal trials governed by the principles of the common law as they may be interpreted *in the light of reason and experience* . . . . In rejecting the proposed [Rule 505] and enacting Rule 501, *Congress manifested an affirmative intention not to freeze the law of privilege.*"

Id. at 47 (emphasis added). Acting on this intention, the Court stated that the appropriate analysis in a case involving the testimonial privilege is to

> "decide whether the privilege against adverse spousal testimony promotes sufficiently important interests to outweigh the need for probative evidence in the administration of criminal justice."

Id. at 51. While finding it unnecessary to abandon the rule completely, (*See* Respondent's Brief at 6 n.3), the Court concluded that the privilege should be severely constricted.

II *The Second Circuit Decisions*

While the Second Circuit has not expressly adopted the joint participants exception to the privilege in question, it has leaned very far, by way of *dictum*, in that direction. In fact, the Fifth Circuit went so far as to say that the Second Circuit had adopted the joint participants exception to the privilege against adverse spousal testimony. *United States* v. *Mendoza*, 574 F.2d 1373, 1381 (5th Cir.), *cert. denied*, 439 U.S. 988 (1978). But the case which it cited for the proposition, *United States* v. *Cotroni*, 527 F.2d 708 (2d Cir. 1975), contained an express reservation on the point. The Second Circuit opinion stated, at 712-13:

> "We therefore do not reach the question whether they [conversations between husband and wife] were admissible because . . . both spouses were participants in patently illegal activity."

Citing United States v. *Kahn*, 471 F.2d 191 (7th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973)—a case discussed below.

An earlier Second Circuit case, *United States* v. *Mackiewicz*, 401 F.2d 219 (2d Cir.), *cert. denied*,

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[6] The Second Circuit has also noted the "vociferous criticism which has characterized the rule as an archaic residue of discarded dogma and an attempt to foster familial harmony which is often more apparent than real." *United States* v. *Fisher*, 518 F.2d 836, 839 (2d Cir.), *cert. denied*, 423 U.S. 1033 (1975).

393 U.S. 923 (1968), decided twelve years before the Supreme Court's decision in *Trammel*, expressed approval of the common law rule against adverse spousal testimony although its holding was that extra-judicial statements by one spouse were not barred by the testimonial privilege.

In an even earlier case in which Judge Learned Hand wrote for the Second Circuit, it was held that a wife's extra-judicial statements to a police officer may be admitted in a criminal prosecution of the husband if the spouses were involved in a joint criminal undertaking. *United States* v. *Pugliese*, 153 F.2d 497, 500-01 (2d Cir. 1945).

At least one judge of this Court has recognized a joint participants exception to the related privilege protecting confidential marital communications in reliance upon the Fifth Circuit decision in *Mendoza*, 574 F.2d at 381. *See United States* v. *Shipp*, 578 F.2d 980, 991 (S.D.N.Y. 1984) (Weinfeld, J.).

In light of the absence of a clear holding concerning a joint participants exception to the privilege against adverse spousal testimony, this Court concludes that the issue is still an open question in the Second Circuit.

III *The Other Circuits*

The circuit courts that have addressed the issue of a joint participants exception to the privilege against adverse testimony have reached differing conclusions. Both the Seventh and Tenth Circuits have explicitly adopted a joint participants exception to the privilege against adverse spousal testimony. The Tenth Circuit recognized the exception in *Trammel* v. *United States*, 583 F.2d 1166 (10th Cir. 1978), *aff'd on other grounds*, 445 U.S. 40 (1980), the Seventh Circuit, in *United States* v. *Van Drunen*, 501 F.2d 1393 (7th Cir.), *cert. denied*, 419 U.S. 1091 (1974), and *United States* v. *Clark*, 712 F.2d 299 (7th Cir. 1983). The Third Circuit refused to recognize such an exception in *Appeal of Malfitano*, 633 F.2d 276 (3d. Cir. 1980), and in *In re Grand Jury Matter*, 673 F.2d 688 (3d Cir.), *cert. denied, sub nom. United States* v. *Doe*, 459 U.S. 1015 (1982).[6] Additionally, at least five circuits have adopted the joint participants exception to a related privilege: the confidential marital communications privilege.[7]

While this Court concurs in the conclusion of both the Seventh and Tenth Circuits that the testimonial privilege may not be successfully asserted when both spouses have engaged in the underlying criminal activity, it recognizes certain weaknesses in the decisions from these circuits.

Both *Trammel* and *Van Drunen* involved witnesses who voluntarily testified against their spouses. Given the Supreme Court's conclusion in *Trammel* that the privilege may be claimed only by the witness-spouse, the holdings in *Trammel* and *Van Drunen* are of questionable vitality. In addition, both *Trammel* and *Clark* adopted the twin rationales for the exception articulated in *Van Drunen*. The *Van Drunen* court presented two reasons for the exception. First, the goals underlying the privilege do not "justify assuring a criminal that he can enlist the aid of his spouse in a criminal enterprise without fear that by recruiting an accomplice or co-conspirator he is creating another potential witness." Second, where both spouses have engaged in criminal activity, there is little reason to encourage the preservation of a marriage which is unlikely to be "an important institution contributing to the rehabilitation of the defendant spouse." *See Van Drunen*, 501 F.2d at 1396-97; *Trammel*, 583 F.2d at 1169-70; *Clark*, 712 F.2d at 301.

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[6] The Fifth Circuit has declined to reach the issue of a joint participants exception. *See United States* v. *Archer*, 733 F.2d 354, 358-59 and n.3 (5th Cir.), *cert. denied*, 105 S.Ct. 198 (1984).

[7] *See, e.g., United States* v. *Kapnison*, 743 F.2d 1450 (10th Cir. 1984); *United States* v. *Neal*, 743 F.2d 1441 (10th Cir. 1984); *United States* v. *Broome*, 732 F.2d 363 (4th Cir. 1984); *United States* v. *Ammar*, 714 F.2d 238 (3d Cir. 1983), *cert. denied sub nom., Stillman* v. *United States*, 104 S.Ct. 344 (1983); *United States* v. *Entrekin*, 624 F.2d 597 (5th Cir. 1980), *rhg. denied*, 629 F.2d 1350, *cert. denied*, 451 U.S. 971 (1980); *United States* v. *Mendoza*, 574 F.2d 1373 (5th Cir.), *cert. denied*, 439 U.S. 988 (1978); *United States* v. *Kahn*, 471 F.2d 191 (7th Cir. 1972), *rev'd on other grounds*, 415 U.S. 143 (1974). *See also United States* v. *Shipp*, 578 F.Supp. 980 (S.D.N.Y. 1984) (Weinfeld, J.). The Ninth Circuit will shortly confront this issue in *In re Hugle*, no. 84-1228.

Prior to *Trammel*, the first argument presented by *Van Drunen* was a highly persuasive one. A person who recruited his spouse into criminal activities could be absolutely certain that—barring divorce[8]—his partner in crime could never testify against him. The *Hawkins* rule gave the defendant the power to prevent his spouse's testimony—even if she was willing to take the stand. However, since *Trammel*, a defendant can no longer prevent his spouse from voluntarily testifying against him. The assurance that the *Van Drunen* court spoke of is thus no longer absolute—it accrues only to a criminal with a loyal spouse.

The second reason advanced by *Van Drunen* in support of the joint participants exception was that

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[8] *See, e.g., Pereira* v. *United States*, 202 F.2d 830, 834 (5th Cir. 1953).

the "rehabilitative effect of the marriage, which in part justifies the privilege, is diminished when both spouses are participants in the crime." *United States* v. *Clark*, 712 F.2d 299, 301 (7th Cir. 1983), citing *Van Drunen* at 1397. Neither *Clark* nor *Van Drunen* cited any authority for the proposition that the rehabilitative effect of a marriage is a justification for the privilege against adverse spousal testimony, and this Court can find none. "Modern views generally point to one of two major policies behind [the privilege's] continued existence: prevention of dissention between spouses which might result from testimony of one against the other, and society's 'natural repugnance' at condemning a person on the compelled testimony of his or her spouse." Ruetlinger, *Policy, Privacy and Prerogatives: A Critical Examination Of The Proposed Federal Rules of Evidence As They Affect Marital Privilege*, 61 Cailf.L.Rev. 1353, 1359-60 (1973). *See*, 8 Wigmore, *Evidence* § 2228 at 216-18 (McNaughton rev. 1961). Given the clear instruction of the Supreme Court that evidentiary privileges in general[9] and this privilege in particular,[10] are to be strictly construed, this Court is reluctant to seek out new rationales for the privilege.

Opposed to the position of the Seventh and Tenth Circuits is that of the Third Circuit. In *Appeal of Malfitano*, 633 F.2d 276 (3d Cir. 1980) and *In re Grand Jury Matter*, 673 F.2d 688 (3d Cir.), *cert. denied, sub nom. United States* v. *Doe*, 459 U.S. 1015 (1982), the Third Circuit rejected the notion that where both spouses are allegedly involved in criminal activity the privilege against adverse spousal testimony does not apply. That Court has held, however, that there is a joint participants exception to the related privilege protecting confidential marital communications. *See United States* v. *Ammar*, 714 F.2d 238 (3d Cir.), *cert. denied sub nom., Stillman* v. *United States*, 104 S.Ct. 344 (1983). In *Ammar*, the Court attempted to harmonize these positions by arguing that the privilege against adverse spousal testimony is designed to protect the marriage (and that marriages involving criminal activity are no less worthy than other marriages of the protection), while the confidential marital communications privilege is designed to protect the communications themselves. *See Ammar*, 714 F.2d at 257-58; *Malfitano*, 633 F.2d at 279 n.5. The Court wrote:

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[9] *See United States* v. *Nixon*, 418 U.S. 683, 709-710 (1974).

[10] *Trammel*, 445 U.S. at 50.

> "[O]ther circuits have recognized [a joint participants] exception to the marital communications privilege, on the ground that such communications are not worthy of protection. [cites]."

Can it be that the *Ammar* court misapprehended the motivation of the other circuits in recognizing a joint participants exception to the confidential marital communications privilege? In all three of the cases cited by *Ammar*, the circuit courts explicitly stated that where both spouses are involved in criminal activity, admitting the evidence would be unlikely to offend marital harmony. *United States* v. *Price*, 577 F.2d 1356, 1365 (9th Cir. 1978), *cert. denied, sub nom. Mitchell* v. *United States*, 439 U.S. 1068 (1979); *United States* v. *Mendoza*, 574 F.2d 1373, 1380 (5th Cir.), *cert. denied*, 439 U.S. 988 (1978); *United States* v. *Kahn*, 471 F.2d 191, 194 (7th Cir. 1972), *rev'd on other grounds*, 415 U.S. 143 (1974).

In light of the rationale articulated by the Fifth, Seventh, and Ninth Circuits this Court questions the validity of the Third Circuit's position. A set of evidentiary rules which permits the introduction of confidential communications between husband and wife but bars the testimony of one against the other seems illogical if the goal of the rules is to preserve and protect marital harmony.

IV *Discussion*

In the absence of precedent in the Second Circuit, and in view of the conflict of authority between the Third, Seventh, and Tenth Circuits, this Court is mindful of its heavy responsibility in ploughing new ground. We note, in passing, that the Supreme Court has twice declined the opportunity to decide the very question presented to this Court. *Trammel*, 445 U.S. 40 (1980), Brief for Respondents at 2, 8, 25-29; *In re Grand Jury Matter*, 673 F.2d 688 (3d Cir.), *cert. denied sub. nom., United States* v. *Doe*, 459 U.S. 1015 (1982), Petition for Certiorari at 6-7.

In *Trammel*, the Supreme Court announced that the appropriate analysis in a case involving the testimonial privilege is to "decide whether the privilege against adverse spousal testimony promotes sufficiently important interests to outweigh the need for probative evidence in the administration of criminal justice." 445 U.S. at 51.

As discussed earlier, there are two interests underlying the privilege against adverse spousal testimony: (1) prevention of dissension between spouses which might result from testimony of one against the other; and (2) society's "natural repugnance" at condemning a person on the compelled testimony of his or her spouse.

To what extent does the recognition of a joint partnership exception that permits the government to compel a person to testify against his or her spouse defeat these policies?

It should be noted at the outset that this Court is not writing on a blank slate. The privilege is no longer the categorical and simple rule that it once was. The federal courts have recognized exceptions to the privilege for cases in which one spouse commits a crime against the other, *Wyatt* v. *United States*, 362 U.S. 525, 526 (1960); one spouse commits a crime against the other's property, *Herman* v. *United States*, 220 F.2d 219, 226 (4th Cir. 1955); one spouse commits a crime against either's children, *United States* v. *Allery*, 526 F.2d 1362 (8th Cir. 1975); the marriage is entered into fraudulently, *United States* v. *Apodaca*, 522 F.2d 568 (10th Cir. 1975); the marriage is beyond preservation, *United States* v. *Fisher*, 518 F.2d 836 (2d Cir.), *cert. denied* 423 U.S. 1033 (1975); the acts about which the witness-spouse testified occurred prior to the marriage, *United States* v. *Clark*, 712 F.2d at 302; the witness spouse's statements are made outside of the courtroom, *United States* v. *Mackiewcz*, 401 F.2d at 225; and where the government has conferred use-fruits immunity on the witness' spouse, *United States* v. *Doe*, 478 F.2d 194, 195 (1st Cir. 1973).

The law of the State of New York, where this Court sits, does not recognize the privilege against adverse spousal testimony.[11] The laws of marriage

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[11] N.Y. CPLR § 4512 provides:

> "Except as otherwise expressly prescribed, a person shall not be excluded or excused from being a witness . . . because he is a . . . spouse of a party."

(For an example of an exception to this rule, *see* N.Y. CPLR § 4502(a) which disqualifies a person from testifying against

and domestic relations are concerns traditionally reserved to the states. *See Trammel*, 445 U.S. at 50. It seems anomalous that a federal court serving the same community should be more zealous in weighing the attributes of spousal relationships that the state courts themselves.

As we discussed earlier at 12, at least three circuits have held that where spouses are jointly engaged in criminal activity, the admission of a spouse's testimony is unlikely to cause marital dissension. *See Price*, 577 F.2d at 1365; *Mendoza*, 574 F.2d at 1380; and *Kahn*, 471 F.2d 194.

The Second Circuit has clearly adopted the position that a person may be incriminated by the extra-judicial statements of his spouse. *See United States* v. *Mackiewicz*, 401 F.2d at 225; *United States* v. *Pugliese*, 153 F.2d 497, 500-01. *A fortiori*, a spouse's extra-judicial statements can also be used to impeach the defendant. *See United States* v. *Neal*, 743 F.2d 1441, 1448 (10th Cir. 1984) (Logan, J. concurring). *Cf. Harris* v. *New York*, 401 U.S. 222 (1971) (statements inadmissible in prosecution's case in chief because of *Miranda* violation may be used for impeachment purposes if defendant testifies). Therefore, the mere fact that the spouse is an instrument of the defendant's incrimination is not so repugnant as to require exclusion of the testimony. And where both spouses have been granted use-fruits immunity, a person may be compelled to testify against his spouse. *See United States* v. *Doe*, 478 F.2d 194, 195 (1st Cir.

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his spouse in an adultery action except as to certain limited matters.) N.Y. Crim. Pro.L. § 60.10 makes this rule applicable in criminal cases.

1973); *In re Grand Jury Matter*, 673 F.2d 688, 694 n.12 (3d Cir.), *cert. denied*, 459 U.S. 1015 (1982). *Cf. Ryan* v. *Commissioner of Internal Revenue*, 568 F.2d 531, 543 (1st Cir. 1977), *cert. denied*, 439 U.S. 820 (1978) (interrogatories).

In conclusion, this Court is persuaded that the recognition of a joint participants exception to the privilege against adverse spousal testimony will not seriously infringe upon the goals underlying that privilege. Furthermore, this Court is reluctant to interfere with the sweeping powers of the grand jury in its investigative functions. *United States* v. *Calandra*, 414 U.S. 338, 350 (1974); *United States* v. *Dionisio*, 410 U.S. 1 (1973). The fair and expeditious administration of the criminal laws requires us to be extremely circumspect in dealing with the claim of a testimonial disqualification by a spouse who is an unwilling witness.

The frequently quoted statement of Jeremy Bentham, in expressing his opposition to the marital testimonial privilege over a century and a half ago, retains its validity today:

> "Let us, therefore, grant to every man a license to commit all sorts of wickedness, in the presence and with the assistance of his wife: let us secure to every man in the bosom of his family, and in his own bosom, a safe accomplice: let us make every man's house his castle; and, as far as depends upon us, let us convert that castle into a den of thieves."

J. Bentham, 5 *Rationale of Judicial Evidence*, 332, 340 (1827), *cited in* 8 J. Wigmore, *Evidence*, § 2228 at 218 (McNaughton rev. 1961).

This Court adheres to its decision of December 4, 1984 holding Hana Koecher in civil contempt of court in violation of 28 U.S.C. § 1826

/s/ Edmund L. Palmieri
EDMUND L. PALMIERI
U.S.D.J.

DATE: December 11, 1984
New York, New York

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M 11-188

IN RE: GRAND JURY SUBPOENA
HANA KOECHER

December 4, 1984
10:00 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Before:

HON. EDMUND L. PALMIERI,
District Judge

APPEARANCES

RUDOLPH W. GIULIANI, United States Attorney for the Southern District of New York,

BRUCE A. GREEN

BARRY BOHRER, Assistant United States Attorneys

MICHAEL KENNEDY, ESQ., Attorney for Witness
148 East 78th Street
New York, New York

THE CLERK: In re grand jury witness Hana Koecher.

MR. GREEN: The government is ready, your Honor.

THE CLERK: For the witness.

MR. KENNEDY: Michael Kennedy on behalf of the witness.

We are ready to proceed, your Honor.

Good morning.

THE COURT: Good morning.

Gentlemen, I am prepared to make an oral decision at this time. The amount of research and preparation involved was such that I could not prepare a formal opinion, but I expect to file one by next Monday. In any event, the sense of that opinion will be contained in the views that I am about to express.

Hana Koecher is being detained as a material witness in a prosecution of her husband Karl F. Koecher for acts of foreign espionage in violation of Sections 794(a) and (c) of 18 United States Code entitled "Gathering or Delivering of National Defense Information to Aid a Foreign Government."

A criminal complaint filed against him on November 27, 1984 resulted in his arrest and incarceration without bail. No charges have been filed against Hana Koecher. She appeared before a grand jury sitting in this district as a subpoenaed witness on November 29, 1984. After being advised of her constitutional rights, Mrs. Koecher was asked a number of questions plainly material to the investigation of which her husband is the target. She steadfastly refused to answer any of the questions asserting, after consulting with counsel, her marital privileges against disclosure of confidential communications with her husband and the giving of testimony potentially adverse to the interests of her husband.

On November 30, 1984, the United States Attorney for this district moved this Court for an order directing Mrs. Koecher to testify notwithstanding her claims of privilege. It was conceded by both sides at the hearing before this Court that the questions before the grand jury involved no confidential communications between husband and wife so that the sole issue here is whether Mrs. Koecher can validly assert her marital disqualification to testify with respect to her actions at a period of time when her husband was allegedly involved in espionage activity on behalf of the Czechoslovakian intelligence apparatus.

The issue squarely presented is whether Hana Koecher can be compelled to give testimony potentially adverse to her husband despite her claimed disqualification.

The common law rule regarding the marital testimonial privilege has ancient roots and was extensively discussed by the Supreme Court in Hawkins against the United States at 358 United States 74, decided in 1958, and Trammel v. United States, 445 United States 40 decided by the Supreme Court in 1980.

In the absence of precedent in the Second Circuit and in view of the conflict of authority between the Third, Seventh and Tenth Circuits, this Court is mindful of its heavy responsibility in plowing new ground.

The Ninth Circuit will shortly confront a related issue in In re William B. Hugle, number 84-1228, where the United States District Court for the Northern District of California in San Francisco, declined to issue a protective order preventing a defendant's estranged wife from volunteering prospective adverse testimony in a espionage case involving, like this one, alleged violations of Section 794(a) and (c) of Title 18 of the United States Code.

This Court is reluctant to interfere with the sweeping powers of the grand jury in its investigatory

functions. The fair and expeditious administration of the criminal law requires us to be extremely circumspect in dealing with the claim of testimonial disqualification by a spouse who is an unwilling witness.

The Federal Rules of Evidence acknowledge the authority of the federal courts to continue the evolutionary development of testimonial principles of common law as they may be interpreted in the light of reason and experience.

Under the General Rule 501 of the Federal Rules of Evidence, which is worth quoting in extenso because I feel that it has a direct and important impact upon this decision, Rule 501 provides that, except as otherwise required by the constitution of the United States or provided by act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

In enacting Rule 501 which I have just quoted from, Congress manifested an affirmative intention not to freeze the law of privilege and to provide the courts with the flexibility to develop rules of privilege on a case by case basis.

There has been a steady erosion of that privilege, the privilege against adverse spousal testimony, in state jurisdictions and scholarly criticism of that privilege has continued for a long time.

Testimonial exclusionary rules and privileges must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.

There is no persuasive reason, in my opinion, why the testimonial disqualification with which we are here concerned should be permitted to stand as a bar to testimony concerning a joint criminal enterprise in which a husband and wife are allegedly both engaged. While I realize that cogent arguments can be made against such a position and, indeed, have been made, I feel that this is the appropriate and wise conclusion to follow in the light of what I have already said.

Judge Seitz and Judge Sloviter of the Third Circuit Court of Appeals have made those cogent arguments and so has Judge Logan of the Tenth Circuit Court of Appeals. Judge Seitz made them in the Malfitano case in 633 Fed. 2d 276, decided in 1980, Judge Sloviter made them in United States against Ammar, 714 Fed. 2d 238, decided in 1983, and Judge Logan made them in United States against Neal, 743 Fed. 2d 1441, decided by the Tenth Circuit in 1984.

I therefore grant the government's motion to direct the witness to answer, and I assume that this will compel us to have a short in camera hearing. I will, therefore, be compelled, if the witness continues to refuse to answer, to warn her that her persistence exposes her to contempt of court and to the sanctions the law permits in such cases.

* * * *

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

85-1033

IN RE: GRAND JURY SUBPOENA

USA, APPELLEE

HANA KOECHER, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of New York

[Filed Feb. 28, 1985]

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of February one thousand nine hundred and eighty-five.

Present:

Hon. Henry J. Friendly
Hon Ellsworth A. VanGraafeiland
Hon. Ralph K. Winter
Circuit Judges,

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is vacated and the issuance of the mandate is stayed pending the disposition of a timely petition for rehearing by the Government and, if such a petition is not timely filed or is denied, for an additional fourteen days to permit the filing of a petition for certiorari and a motion for a stay and, if such a motion is filed, pending the disposition thereof in accordance with the opinion of this court.

ELAINE B. GOLDSMITH
Clerk

by /s/ Edward J. Guardaro
EDWARD J. GUARDARO
Deputy Clerk

APPENDIX I

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 11th day of April one thousand nine hundred and eighty-five.

No. 85-1033

IN RE: GRAND JURY SUBPOENA

UNITED STATES OF AMERICA, APPELLEE

HANA KOECHER, DEFENDANT-APPELLANT

[Filed Apr. 11, 1985]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

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OPPOSITION
BRIEF

Office-Supreme Court, U.S.
FILED
JUL 15 1985
ALEXANDER L. STEVAS,
CLERK

2

No. 84-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

◆

UNITED STATES OF AMERICA,
Petitioner,

—v—

HANA KOECHER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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July 1985

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether this Court should create an exception to the privilege of a spouse not to testify against her marriage partner, recognized by this Court in Trammel v. United States, 445 U.S. 40 (1980), and deeply rooted in common-law tradition and constitutional concerns for familial privacy, where the government claims that the spouses were joint participants in criminal activity.

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In the Supreme Court of the United States
October Term, 1984

No. 84-1922
UNITED STATES OF AMERICA,
Petitioner,

v.

HANA KOECHER,
Respondent

Respondent's Brief in Opposition
to Petition for Certiorari

Respondent Hana Koecher respectfully submits this brief in opposition to the petition of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

STATEMENT OF THE CASE

This case concerns the government's efforts to compel respondent Hana Koecher, against her will and in violation of the long-standing marital testimonial privilege recognized by this Court in Trammel v. United States, 445 U.S. 40 (1980), to give testimony potentially adverse to her husband, Karel F. Koecher, before a grand jury that has already indicted him and that continues to investigate his activities with a view to bringing further charges against him.[*]

Karel and Hana Koecher have been married for more than 21 years. On November 27, 1984, Mr. and Mrs. Koecher were arrested pursuant to warrants issued that same day. Karel Koecher was charged in a complaint signed by a special agent of the Federal Bureau of Investigation with conspiring to transmit national defense documents to a foreign government in violation of 18 U.S.C. §794. His wife Hana was not charged with any crime. Rather, she was detained as a material witness, and subpoenaed to appear before a grand jury investigating the charge against her husband. App. 1a-2a.[**]

When Mrs. Koecher appeared before the grand jury, she declined to answer questions put to her concerning the alleged espionage plot, explicitly invoking the marital testimonial privilege. On December 4, 1984, on the government's motion, Mrs. Koecher was held in civil contempt by the United States District Court for the Southern District of New York. That court held that the marital testimonial privilege was subject to an

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[*] The case does not involve the separate privilege for confidential marital communications also recognized in Trammel. Pet. 8 n.6. ("Pet." refers to the government's petition for certiorari. "App." refers to the appendix to that petition. "Tr." means transcript.)

[**] The circumstances of the arrest were highly
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unusual. Karel Koecher had been employed by the Central Intelligence Agency from 1973 to 1975, and the events that are the subject of the charges against him occurred during that period. Although the government apparently had long known of these events, the FBI first approached him in November of 1984, shortly before the date of his arrest, and interrogated him and his wife for approximately ten days. During this period Mr. Koecher, consistent with his claim of loyalty to the United States, cooperated fully with the agents, and was not placed under arrest. On November 27, 1984, Mr. and Mrs. Koecher were arrested by the same agents who had previously volunteered to drive them to Kennedy Airport, where they were to depart for Vienna in a long-planned change of residence. All of the information in the complaint against Karel and the material witness affidavit concerning Hana is purportedly drawn from statements made by Karel Koecher during the lengthy interrogation sessions. See U.S. v. Karel Koecher, Tr. of 12/4/84 (bail hearing), at 29-59 (testimony of FBI Agent Kenneth Geide).

exception where husband and wife were joint participants in criminal activities, a circumstance the court believed applied in this case. App. 2a-3a.[*] The court refused to stay its order, and Mrs. Koecher was incarcerated.[**]

On February 28, 1985, the United States Court of Appeals for the Second Circuit, in a thorough opinion by Judge Henry Friendly for a unanimous panel, reversed that judgment, holding that there was no such exception to the marital privilege. In re Grand Jury Subpoena (Koecher), 755 F.2d 1022 (2d Cir. 1985) (reprinted at App. 1a-15a).[***] After carefully considering and rejecting the various arguments put forward by the government in support of the purported exception, Judge Friendly concluded that the exception "could create exactly the negative impact on the marriage that the privilege was designed to avoid." App. 13a, citing In re Malfitano, 633 F.2d 276 (3d Cir. 1980). Given the importance to society and constitutional dimensions of the marital relationship, recognized by this Court not only in Trammel but also in Griswold v. Connecticut, 381 U.S. 479 (1965), and the "natural repugnance in every fairminded person to compelling a wife or husband to be the means of the other's condemnation," 8 Wigmore, Evidence §2228 at 217 (emphasis in original), the Court of Appeals refused to endorse a rule that would have such a devastating effect. App. 14a.

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[*] The court rendered an oral opinion on that date (App. 56a-60a), and issued a written opinion on December 11, 1984. App. 40a-50a.

[**] Mrs. Koecher remained in jail for nearly four months before being released on bail after the Court of Appeals reversed the contempt order.

[***] While the contempt adjudication was on appeal, the grand jury returned an indictment charging Karel Koecher in a single count with conspiracy to violate §794. The Court of Appeals thereupon vacated the contempt adjudication and remanded for a determination whether the grand jury was being
(Footnote Continued)

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improperly abused to prepare for trial of that indictment. App. 61a-62a. On January 30, 1985, the District Court again held Mrs. Koecher in contempt (App. 19a-20a), after finding that the grand jury was continuing to investigate, among other matters, "whether other offenses than that in the one count indictment should be charged against" Mr. Koecher. App. 34a.

Having unsuccessfully sought rehearing and rehearing en banc (App. 63a-64a), the government now seeks review in this Court.

REASONS WHY THE WRIT SHOULD BE DENIED.

None of the considerations in this Court's Rule 17 support a conclusion that this case warrants review.

First, the carefully-reasoned opinion of a distinguished and moderate panel conflicts with no decision of this Court and creates no new rule of law. Instead, the court's opinion conforms to an ancient principle of the common law, modernized and reaffirmed by this Court only five years ago. As a straightforward application of a long-recognized rule of privilege, the judgment of the court below should not be disturbed.

Second, although the court below rightly rejected occasional suggestions in opinions of other courts of appeals that long-standing principles

should be abandoned and a new exception created, no square conflict between the circuits in fact exists. As Judge Friendly recognized (App. 9a & n.5), all of the cases cited by the government as conflicting with the decision below rest on alternate grounds of decision as well, so that the endorsement of the joint participant exception was unnecessary to their resolution. To the extent that the approaches of different courts of appeals do vary, this is an appropriate occasion for the Court to stay its hand and monitor future developments before resolving those differences. Since the "conflict" involves an evidentiary rule, applicable principally to criminal cases, no one is subject to conflicting legal demands, and the potential for forum-shopping is limited. On the other hand, in an area where Congress has instructed this Court to be guided by "reason and experience," Fed. R. Evid. 501, prudent evaluation of the costs and benefits of adopting a new rule will be facilitated by allowing the lower courts to administer the privilege according to their different approaches, rather than prematurely rushing to accept or reject a novel exception to a venerable principle that this Court has only recently put on a modern footing.

Third, this case is an inappropriate one for considering the merits of the joint participant exception, because of the weakness of the showing that the circumstances claimed to warrant such an exception exist here. In previous cases suggesting the appropriateness of such an exception, the witness spouse had been indicted or had voluntarily admitted participation after being caught red-handed in criminal activities. In this case, in contrast, the "showing" of participation by Mrs. Koecher rests entirely on inadmissible hearsay statements of her husband carefully selected out of context from a week-long interrogation in which Karel Koecher steadfastly maintained his own and his wife's innocence of any crime. Even if a joint participant exception were proper in some circumstance, this case would hardly be a proper one to decide the issue.

I

THE SECOND CIRCUIT'S REJECTION OF A "JOINT PARTICIPANT" EXCEPTION TO THE MARITAL TESTIMONIAL PRIVILEGE CORRECTLY APPLIED LONG-ESTABLISHED LAW.

In Hawkins v. United States, 358 U.S. 74 (1958), this Court unanimously reaffirmed the importance of the principles underlying the privilege of one spouse not to testify against the other in a criminal proceeding:

> The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well. Such a belief has never been unreasonable and is not now.

Id. at 77. While the Court in Trammel v. United States, supra, correctly brought the ancient privilege into line with its modern rationale by vesting the privilege in the witness-spouse rather than in the defendant-spouse, the Court, again unanimously, adhered to the view that a spouse may not be compelled to testify against his or her marital partner involuntarily, once again acknowledging the privilege's "perceived role in fostering the harmony and sanctity of the marriage relationship." 445 U.S. at 44.[*] The Court has thus consistently adhered to the view that the marital privilege serves important social interests, and basic notions of human dignity, by assuring individuals that the state will not attempt to disrupt the intimate union between two persons that constitutes marriage by forcing one spouse to become an instrument to the other's criminal conviction.

The principle applied by the court below is no mere rule of evidence; rather, it represents fundamental values of our common law heritage and constitutional tradition. As this Court recalled in Trammel, the privilege relied upon here has "ancient roots": by the year 1628 it was already a long-standing principle of law. 445 U.S. at 43-44.

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[*] This Court in its rule-making capacity has also declined to abandon the strong policy in favor of marital harmony, having recommended to Congress that the marital testimonial privilege be retained. See Proposed Federal Rule of Evidence 505.

But this ancient lineage does not mean that the privilege has been superseded by modern developments. Despite considerable criticism of the privilege over the years, this Court only five years ago reaffirmed its commitment to the fundamental values underlying the privilege, even as it modernized and rationalized the law by altering the traditional locus of the privilege.

Indeed, if changing legal and social conditions have worked any change in the need for such a privilege, the effect has been to strengthen rather than to undermine the case for the privilege. Since the decision in Hawkins, this Court has given eloquent recognition to the constitutional status of the marital relationship as a basic human right, and has insisted that the state may not intrude into its privacy and sanctity. Griswold v. Connecticut, supra; see also Zablocki v. Redhail, 434 U.S. 374 (1978). And, as the leading contemporary scholar of the law of evidence has noted, "the stresses of modern society make more attractive than ever before the prospect of a safe harbor of intimacy where spouses can confide in each other freely without any fear that what they say will be published under compulsion." 2 Weinstein & Berger, Weinstein's Evidence ¶505[02], at 505-12 (1982).

The Second Circuit's decision in this case is fully in conformity with these basic and long-standing principles. Before the handful of cases relied upon by the government,[*] no court or legislature had ever hinted at the existence of the exception for which the government argues. While the government points to various commentators who have criticized the rationale for maintaining the privilege, it cites no scholar who has accepted the basic premise of the privilege -- as this Court has -- but argued for an exception of the sort the government proposes here. Similarly, while the government notes that some states have abolished the privilege entirely, it fails to point to a single one of the approximately 30 states that have

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[*] United States v. Clark, 712 F.2d 299 (7th Cir. 1983); United States v. Trammel, 583 F.2d 1166 (10th Cir. 1978), aff'd on other grounds, 445 U.S. 40 (1980); United States v. Van Drunen, 501 F.2d 1393 (7th Cir.), cert denied, 419 U.S. 1091 (1974).

retained the privilege in either the traditional form or in the modern form adopted in Trammel that has recognized the "joint participant" exception.

The reasons for the total lack of support for the government's proposed rule are evident from Judge Friendly's scholarly opinion in this case.

First, recognition of this exception would be totally inconsistent with the basic policies underlying the marital privilege. As Judge Friendly points out, the basic foundations of the marital privilege are

> "its perceived role in fostering the harmony and sanctity of the marriage relationship," Trammel, 445 U.S. at 44, see also id. at 53, and the "natural repugnance in every fairminded person to compelling a wife or husband to be the means of the other's condemnation, and to compelling the culprit to the humiliation of being condemned by the words of his intimate life partner," 8 Wigmore §2228 at 217 (emphasis in original), forced from her by governmental compulsion.

App. 14a (footnote omitted).[*]

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[*] Somewhat peculiarly, the government seems to question whether this Court has ever adopted the second rationale. Pet. 12 n.12. As Judge Weinstein notes, precisely this concern was central to this

(Footnote Continued)

These rationales lose none of their force when the government alleges that both marital partners were involved in criminal activities. The fact that a husband and wife have violated a criminal law does not deprive them of fundamental human qualities. Even convicted criminals -- let alone anyone the government alleges has committed a crime -- require and are entitled to the intimate support and affection of their marriage partner.[*] There is no reason to suppose that because a husband and wife succumb to the temptation to commit a crime, they are any the less intimately linked to

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Court's reasoning in *Hawkins*. 2 Weinstein & Berger, Weinstein's Evidence, ¶505[02] at 505-9. Although the government correctly points out that the two rationales are substantially overlapping, there is an important conceptual difference: the first reason essentially invokes *social* goals, while the second emphasizes human dignity.

[*] Whether the state can constitutionally prohibit marriage even by prison inmates serving less than life sentences remains an open question. *See Bradbury* v. *Wainwright*, 718 F.2d 1538, 1540-42 & nn. 3-4 (11th Cir. 1983); *In re Goalen*, 414 U.S. 1148, 1148-50 (1974) (Stewart, J., dissenting from denial of certiorari). *Cf. Johnson* v. *Rockefeller*, 365 F.Supp. 377 (S.D.N.Y. 1973), *aff'd sub nom. Butler* v. *Wilson*, 415 U.S. 953 (1874).

each other's destinies, or that society is entitled to disrupt or devalue the bond that ties them together. As the Court of Appeals aptly observed:

> We also are unable to accept the proposition that a marriage cannot be a devoted one simply because at some time the partners have decided to engage in criminal activity. This is especially true with respect to political offenses, as witness some celebrated cases in this very court.

App. 11a.[*] That the testifying spouse has also sinned cannot lessen the "natural repugnance" at the spectacle of the government forcing someone to betray and condemn one to whom he or she has pledged lifelong fidelity. Moreover, it cannot be forgotten that the government seeks to impose these drastic consequences where neither spouse has been convicted of *any* crime, and where it has not even *charged* Mrs. Koecher with any offense.

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[*] The contrary view expressed in *United States* v. *Trammel*, *supra*, 583 F.2d at 1170-71, with all due respect to that court, represents a crabbed and contemptuous view of humanity. Even dealing in narcotics, a serious and dangerous crime, does not justify treating a criminal as an outlaw, deprived of all human rights, or concluding that he is so debased that the sacred and intimate relationships to which he commits himself can be disdained as
(Footnote Continued)

Second, the reasons put forth by the government for adopting an exception, particularly when balanced against the compelling principles underlying the privilege, are singularly lacking in weight. The government asserts that the Court of Appeals erred in failing to apply a "balancing test" to decide whether to apply the privilege. (Pet. 11). But surely this misconceives the balancing that this Court called for in Trammel. This Court did not suggest that in each case a court must decide whether to permit a privilege to be invoked by weighing the benefits of the privilege in that case against the cost of the evidence foregone. What the Court held in Trammel was that in deciding whether to recognize a category of privilege, the Court must engage in balancing to "decide whether the privilege against adverse spousal testimony promotes sufficiently important interests to outweigh the need for probative evidence in the administration of criminal justice." 445 U.S. at 51. Having conducted that balancing, and determined that, at least in the form recognized in Trammel, the interests served by the privilege did indeed outweigh the public's need for evidence, the Court said nothing to suggest that lower courts must rebalance the interests in every case in which privileges are asserted, and create ad hoc exceptions wherever they can argue that the interests recognized by this Court in Trammel operate with less than full force.

But even if such ad hoc balancing were to be conducted, the government can only reach the result it wishes by placing a fairly obvious thumb on the scales. The government begins by trying to degrade the sanctity of marriage where the partners to the marriage have ostensibly committed a crime. As already noted, this claim is strange: Does the government really mean to suggest that "There [is] no domestic harmony in the commonly accepted nature of a marital relationship to be preserved following commencement of the criminal activities" of, for example, embezzlement? Compare Pet. 12, quoting

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(Footnote Continued)
lacking in "any of the usual, ordinary attributes of 'family life'."

United States v. Trammel, supra, 583 F.2d at 1170, with United States v. Clark, 712 F.2d 299 (7th Cir. 1983) (joint participant exception proper in bank embezzlement scheme). The government is correct that when spouses act as partners in crime, their behavior is antithetical to society's values (Pet. 13); this does not at all mean that their marriage is devoid of the values society fosters in promoting marriage, or that it is either beneficial to society or consistent with human rights for the state to disrupt or undermine that marriage.

On the other side of the balance, the government greatly exaggerates the benefits it hopes to obtain from compelling spouses to incriminate each other. As Judge Friendly pointed out, the government's claim (Pet. 15-16) that recognition of the privilege would encourage criminals to recruit their spouses as accomplices is overblown: after Trammel, "A person desiring to enlist the aid of his spouse as an accomplice cannot now be sure that he is not creating another potential witness; he takes the risk that the spouse may choose to testify." App. 10a-11a. Nor is the government recognizing reality when it contends that the damage to marital harmony and human dignity that it proposes will be balanced by significant gains for the truth-finding process: the sorts of cases it hypothesizes, where the witness it seeks to compel is simultaneously a participant in crime and deeply devoted to the interests of the defendant on trial, are hardly cases in which an order to testify is likely to generate reliable, accurate testimony, or indeed any testimony at all.* Despite its bold claims, the government, in fact, cannot point to a single case in which the "joint participant" exception has produced the claimed benefits; in the only case recognizing the exception in which a spouse was ordered to testify over his own, rather than his spouse's, claim of privilege, the witness spouse refused to testify and was held in contempt rather than testify against his wife. United States v.

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*Indeed, in this very case, Mrs. Koecher has repeatedly asserted that she will never testify against her husband, and has already served four months in jail rather than do so.

Clark, supra, 712 F.2d at 300.* The search for truth was not benefited, and the total social gain was a short additional jail term for a convicted petty embezzler.

Finally, the government notes several cases recognizing a crime or fraud exception to other privileges, including the marital communications privilege. Pet. 16-17. But as Judge Friendly carefully explained, these privileges have different purposes, and serve different interests, than the testimonial privilege at issue here, and it is not surprising that exceptions applicable to those privileges do not apply to this one. App. 12a-13a. The Third Circuit, for example, "perceives no contradiction between its holdings ... that there is no exception to the general spousal privilege for criminal activity and ... 'that communications between spouses pertaining to ongoing or future criminal activity are not protected against disclosure by the privilege for confidential marital communications.'" App. 13a, comparing In re Malfitano, supra, 633 F.2d at 280, with United States v. Ammar, 714 F.2d 238, 257-58 (3d Cir.), cert. denied, 104 S.Ct. 344 (1983). Other jurisdictions similarly recognize that the different policies underlying the separate marital privileges require rejection of the "joint participant" exception as to the general testimonial privilege while permitting its recognition as to the confidential communications privilege.*

By applying the spousal privilege recognized by this Court in Trammel, the court below applied a well-established evidentiary rule in

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* The other cases relied on by the government, United States v. Trammel, supra, and United States v. Van Drunen, supra, were pre-Trammel cases in which the witness' spouse testified voluntarily.

* See, e.g., Alaska Rules of Evidence, Rules 505(a), 505(b)(2)(B)(1979); Puerto Rico Rules of Evidence, Rules 27(B), 27(D)(7)(1959). Despite its adoption of the joint participant exception to both privileges, the Seventh Circuit was careful to note in Van Drunen that its earlier ruling upholding the exception with respect to the confidential communications privilege was "not necessarily controlling, for the two marital privileges must 'be sharply distinguished.'" 501 F.2d at 1396, quoting McCormick, Evidence §78 (2d ed. 1972).

accord with its recognized principles, and declined to create a novel exception that is at odds with the traditional and still-sound policies underlying that rule. Its decision was a correct, indeed routine, application of established law, in accord rather than in conflict with this Court's precedents. That decision should not be disturbed.

II

THE DECISION OF THE COURT BELOW DOES NOT SQUARELY CONFLICT WITH ANY DECISION OF ANY OTHER COURT OF APPEALS.

In petitioning for review in this case, the government relies heavily on the claim that the Second Circuit's decision in this case presents a conflict among the circuits. Pet. 9. See Supreme Court Rule 17.1(a). The government is of course correct that in contrast to the decision below, opinions of the Seventh and Tenth Circuits have indicated approval of the "joint participant" exception sought by the government in this case. United States v. Clark, supra, 712 F.2d at 300-02; United States v. Trammel, supra, 583 F.2d at

1168-71; United States v. Van Drunen, supra, 501 F.2d at 1396.* Careful examination of those cases, however, shows that the judgment in none of them was the discussion of the joint participant exception necessary to the judgment. Accordingly, none of those cases present square conflicts with the decision below. Under these circumstances, and where Congress has directed the courts to develop rules of privilege in accordance with "reason and experience," Fed.R.Evid. 501, there is no reason for this Court to rush to pass upon the propriety of a newborn "exception" to an ancient privilege.

The Tenth Circuit's judgment in Trammel is not in conflict with the decision below, because in that case the witness-spouse testified voluntarily, and did not claim the privilege. At that time, the governing law held that the defendant spouse was privileged to prevent adverse testimony even by a *willing* spouse. *See* *Hawkins* v. *United States*, *supra*. In *Trammel*, the Tenth Circuit declined to apply that rule where both spouses had jointly participated in the criminal conspiracy, and where the witness spouse had willingly testified as part of a voluntary immunity agreement with the government. 583 F.2d at 1169. The court's references to the "joint participant" exception cannot be divorced from their factual context: that the Tenth Circuit was willing to find an exception to the *Hawkins* privilege to permit a willing spouse to testify does not mean that it would *compel* an unwilling spouse to testify on the same theory.* How the Tenth Circuit would decide the instant case is therefore totally unclear. After this Court's ruling in *Trammel*, however, it is perfectly clear that the Second Circuit would now reach exactly the

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*Like the Second Circuit, the Third Circuit has explicitly rejected the "joint participant" exception and adhered to the traditional view. In re Grand Jury Matter, 673 F.2d 688 (3d Cir.), cert. denied, 459 U.S. 1015 (1982); In re Malfitano, supra.

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*Indeed, since this Court affirmed the judgment in *Trammel* on the very different ground that a defendant spouse can *never* prevent a willing spouse to testify against him, the Tenth Circuit opinion in *Trammel* has now been superseded in any event.

same result on the facts of that case that the Tenth Circuit did: the witness wife would be permitted to testify. In short, it cannot be said that the judgments of the Tenth Circuit in *Trammel* and of the Second Circuit here are in conflict.

The Seventh Circuit cases cited by the government are also consistent with the decision below, because in both cases the testimony sought concerned events that had occurred *before* the witness and the defendant had been married, and in each case the Seventh Circuit relied upon that fact as an alternate basis for its decision. *United States* v. *Van Drunen*, *supra*, 501 F.2d at 1397; *United States* v. *Clark*, *supra*, 712 F.2d at 302. That the marital privilege does not apply in such circumstances is well-recognized. Indeed, the Federal Rules of Evidence as adopted by this Court, which did *not* contain any joint participant exception, *did* contain a provision denying the privilege as to "matters occurring prior to the marriage." Proposed Fed. R. Evid. 505(c)(2). There is thus no reason to suppose that the Second Circuit would reach a result different from that of the

Seventh on the facts of Van Drunen and Clark, and the Seventh Circuit in turn has never squarely faced the situation presented by the instant case.* Once again, it cannot be said that the judgments of the two circuits are in conflict.

Nor can it be claimed that the different approaches to the "joint participant" exception present a situation urgently requiring resolution by this Court. The fact pattern in question is hardly a commonly recurring one: in the five years since this Court decided Trammel, only four cases involving the issue have reached the courts of appeals.** Nor is it a question about which the courts have been deeply divided: of those four decisions, only the Seventh Circuit's opinion in Clark departs from the traditional rule of

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* Van Drunen is also distinguishable on the same grounds as Trammel, since that case too involved a willing witness.

** United States v. Clark, supra; In re Grand Jury Matter, supra; In re Malfitano, supra; and the instant case.

privilege, and, as noted, in that case other grounds defeated the claim of privilege in any case.

Moreover, the most serious problems associated with differing rules in different circuits are not really present here. Since the issue is one of evidence, rather than of a substantive rule of behavior, no person or entity will be subject to conflicting rules in different parts of the country. And since the issue is one that arises virtually only in criminal cases, the possibility of forum shopping is minimized.

On the other hand, there are important reasons for this Court to deny review at this time. Only five years ago, in Trammel, this Court revolutionized the law of marital privilege, overturning the centuries-old rule that the privilege belonged to the defendant spouse, and for the first time recognizing as well a separate privilege for confidential marital communications. It would therefore be prudent to allow the lower courts additional time to consider the issues involved, and to gather more of the "experience" called for by Rule 501 and necessary to evaluate how the differing approaches of the circuits work out in practice.* As the Court wisely noted in Trammel, "[T]he long history of the privilege suggests that it ought not to be casually cast aside. That the privilege is one affecting marriage, home, and family relationships -- already subject to much erosion in our day -- also counsels caution." 445 U.S. at 48. The Court worked a major change in the law in Trammel, with apparently beneficial results. Nothing about the facts of this case or the legal landscape suggests that another intervention into this area is immediately necessary.

This Court has already denied certiorari on this issue, when the government sought review of the Third Circuit decision in In re Grand Jury

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*Although Rule 501 calls for the courts to develop the law of privilege in light of "reason and experience," the government's analysis is remarkably short on the latter. The government does not even claim, much less substantiate, that the marital privilege has created any difficulties for law enforcement since this Court reformed it in Trammel, or that any significant benefits have flowed from the recognition of their suggested exception in the Seventh and Tenth Circuits.

Matter, supra. See United States v. Doe, 459 U.S. 1015 (1982). Nothing has occurred since that time that makes the issue more ripe for review. Contrary to the government's claim (Pet. 9 n.7), the "conflict" among circuits has not "broaden[ed]" or become "clearer" since then, for no new court has expressed approval of the novel exception sought by the government. The only additional decision supporting the government's innovation is United States v. Clark, supra, which, as noted above, was not a proper case for invocation of the privilege regardless of the joint participant exception. Essentially, the situation remains where it was when this Court denied review in Doe: two courts, the Seventh and Tenth Circuits, have expressed their approval of a new exception to the marital privilege in cases in which adoption of that exception was not necessary to the result reached. That situation hardly requires adding to this Court's heavy workload.

III

THE FACTUAL BASIS FOR APPLYING A JOINT PARTICIPANT EXCEPTION HAS NOT BEEN ADEQUATELY DEMONSTRATED.

Another distinguishing factor between the instant case and those in which other circuits have recognized a "joint participant" exception is one that also constitutes an independent reason to deny certiorari in this case: in the present matter, the government's evidence that Mrs. Koecher really was a joint participant in any criminal venture with her husband is exceedingly weak.[*]

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[*] In contrast, the marital union that the government seeks to disrupt by forcing this testimony is far stronger than those in the cases it relies on. The Koechers have been married for over 20 years, and remain deeply devoted to each other. In both Van Drunen and Clark, on the other hand, the marriages were of very recent vintage, post-dating the events at issue in the trial, and even, in Van Drunen, the defendant's indictment. 712 F.2d at 300; 501 F.2d at 1394. In Trammel, the couple had been married for less than a year at the time of the indictment, and were already contemplating divorce. 445 U.S. at 42 & n.1. Moreover, in both Trammel and Van Drunen,
(Footnote Continued)

In both Van Drunen and Trammel, it will be recalled, the witness-spouse willingly testified, and admitted her own participation in the events in question. (In Trammel, moreover, the witness-spouse had been caught in a customs search carrying a substantial quantity of heroin.) In Clark, the witness-husband had already been convicted for his part in the crime before the government sought to subpoena him at his wife's trial. 501 F.2d at 300.

In stark contrast, the government here apparently does not have adequate evidence to seek an indictment against Mrs. Koecher. The only showing of her "participation" that has been publicly made is contained in the material witness affidavit filed by an FBI agent.[*] That affidavit is

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(Footnote Continued)
the witness spouse testified voluntarily against her husband, thus, as this Court pointed out, justifying the inference that "their relationship is almost certainly in disrepair: there is probably little in the way of marital harmony for the privilege to preserve." 445 U.S. at 52.

[*] The district court at one point suggested that a reference to Mrs. Koecher in the overt act section of the indictment against her husband suggested that
(Footnote Continued)

based entirely on statements attributed to Mr. Koecher, purportedly taken from his ten-day long series of interviews with the FBI.

Not only are these statements inadmissible hearsay with respect to Mrs. Koecher, but they are also of highly dubious reliability. Since Mr. Koecher has at all times maintained his innocence of any criminal conduct, any statement of his regarding conduct of him and his wife, even if accurately reported by the agent, must be placed in the context of Mr. Koecher's assertion that his intentions were at all times innocent. Viewed in that light, the statements do not constitute a "confession" of criminal conduct even as to him, still less an accusation that his wife acted with a culpable

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(Footnote Continued)
the grand jury regarded her as a co-conspirator. App. 37a. This suggestion is erroneous. Since the indictment carefully specifies that Mrs. Koecher performed the act referred to at her husband's direction, the act would be attributable to him and would therefore be a valid overt act in furtherance of the conspiracy regardless of whether Mrs. Koecher was a conspirator. The indictment in fact is carefully drafted to avoid describing Mrs. Koecher as a participant.

intent. Mrs. Koecher, meanwhile, has at all times asserted her innocence. App. 14a.*

The circumstances thus fully justify Judge Friendly's statement that

> Another factor inclining us to reject a joint participation exception to the spousal privilege is the difficulty often encountered in establishing the predicate without invading the privilege. This case is a good example.

App. 13a-14a (footnote omitted). The government apparently has no evidence whatever that Mrs. Koecher participated in any wrongful act, except statements allegedly wrung from her husband during interrogation. Judge Friendly is certainly correct that this problem argues against recognizing the privilege.* At the very least, however, it counsels that if this Court is inclined to explore the desirability and contours of any potential exception to the privilege for joint participants in crime, it should wait for a case in which the factual predicate for the government's claimed exception is more strongly demonstrated.

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*In an artfully worded assertion, the government claims that Mrs. Koecher did not, at the time of her initial grand jury appearance, "contest the government's claim that she was involved in the espionage scheme; rather, she argued that there is no joint participant exception to the marital testimonial privilege." Pet. 4. This is doubly misleading. First, the government cites in support of its claim only Mrs. Koecher's statement to the grand jury invoking the marital privilege, a blanket legal claim that certainly is not an admission of wrongdoing. App. 2a-3a, 40a-41a. Second, the government ignores the fact that Mrs. Koecher has, throughout these proceedings, asserted that she is innocent of participation in any conspiracy, and that the government has failed to prove the contrary. This assertion has been made to the FBI (App. 14a), to the District Court (App. 37a), and to the Court of Appeals (App. 8a).

* * *

In short, the decision of the Court of Appeals to adhere to the established principles of the marital privilege reaffirmed by this Court in Trammel was correct. Moreover, its judgment was not in conflict with that of any other court of appeals, for no other circuit has recognized an exception to the marital privilege to force an unwilling spouse to testify about events occurring during the marriage, or indeed has recognized such an exception at all where the marriage was as stable and the factual showing of joint participation as weak as in this case. In any event, the courts have had insufficient experience with the administration of the marital privilege since this Court revolutionized the privilege in Trammel to allow the Court to make a fully informed evaluation, in the light of "reason and experience", of the desirability of recognizing the novel erosion of the privilege demanded by the government. Under these circumstances the Chief Justice's caution in Trammel against "casually" eroding the privilege is surely well taken.

---

* The "natural repugnance" referred to by Wigmore must surely be intensified where the government elicits statements incriminating a wife during a lengthy interrogation of her husband, then uses those statements as the sole basis for its claim that the wife must testify to buttress its case against the husband.

CONCLUSION

For the reasons set forth above, the writ of certiorari should be denied.

Respectfully submitted,

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PETITIONER'S

BRIEF

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No. 84-1922 ③

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

HANA KOECHER

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a witness has a privilege to refuse to testify concerning criminal activity in which she and her husband jointly participated on the ground that the testimony would be adverse to the interests of her husband.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 755 F.2d 1022. The prior order of the court of appeals (Pet. App. 16a-18a) is unreported. The opinion (Pet. App. 24a-39a), oral order (Pet. App. 19a-20a), and written order (Pet. App. 21a-23a) of the district court on remand are unreported. The prior written opinion of the district court (Pet. App. 40a-55a) is reported at 601 F. Supp. 385. The prior oral opinion of the district court (Pet. App. 56a-60a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 61a-62a) was entered on February 28, 1985. A petition for rehearing was denied on April 11, 1985 (Pet. App. 63a-64a). The petition for a writ of certiorari was filed on June 10, 1985, and was granted on October 7, 1985. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 501 of the Federal Rules of Evidence provides in pertinent part:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

STATEMENT

1. In the fall of 1984, a grand jury in the United States District Court for the Southern District of New York commenced an investigation into espionage activity believed to have been engaged in by respondent and her husband, Karel F. Koecher. The inquiry focused upon the transmittal to the Czechoslovak Socialist Republic of information and classified documents obtained by Karel Koecher while he was employed by the Central Intelligence Agency.

On November 27, 1984, several hours before he and respondent were to leave the United States, Karel Koecher was arrested on a complaint charging him with conspiring to communicate classified national defense information to the Czechoslovak Intelligence Service between 1973 and 1975. C.A. App. 97-99; Pet. App. 2a, 36a. At the same time, respondent was arrested as a material witness on the basis of an affidavit stating that she and her husband "were directed by agents of the Czechoslovak Intelligence Service to attempt to penetrate United States intelligence agencies" and that she acted as a paid courier for the Czechoslovak Intelligence Service. C.A. App. 95-96; Pet. App. 35a-36a.

Both the complaint and the affidavit were based upon Karel Koecher's written confession, in which he admitted that between 1963 and 1965 he had been trained to serve in the United States as an officer of the Czechoslovak Intelligence Service. Koecher was instructed to "penetrate" the Central Intelligence Agency, and in February 1973 he gained employment with the CIA. The complaint states that Koecher admitted that "[b]etween February 1973 and August 1975, [he] passed to the Czechoslovak Intelligence Service virtually any classified or other material, information, assessments, and CIA personnel identifications which he obtained or learned during his CIA employment." C.A. App. 98; Pet. App. 35a-36a.

Respondent appeared before the grand jury pursuant to a subpoena on November 29, 1984, but declined to answer questions concerning her espionage activities.[1] Respondent claimed a privilege not to give testimony adverse to the interests of her husband.[2] The Government sought an order from the district court directing respondent to answer the questions, contending that the privilege against adverse spousal testimony did not apply because respondent participated jointly with her husband in the criminal activity under investigation by the grand jury. Respondent did not contest the government's claim that she was involved in the espionage scheme; rather, she argued that there is no joint participant exception to the marital testimonial privilege. Pet. App. 2a-3a, 40a-41a.

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[1] The questions were (Pet. App. 2a n.1):

Q. Mrs. Koecher, did you ever deliver classified information relating to the national defense of the United States to the Czechoslovakian Intelligence Service?

Q. Mrs. Koecher, have you ever received money from agents of the Czechoslovakian Intelligence Service as payment for information and documents that you delivered to them?

Q. Mrs. Koecher, have you ever met with agents of the Czechoslovakian Intelligence Service?

[2] Respondent also cited the privilege against disclosure of confidential marital communications, but she subsequently acknowledged that the question did not require the disclosure of such confidential

On December 4, 1984, the district court directed respondent to answer the questions (Pet. App. 41a-42a).[3] The court rejected respondent's claim of privilege, concluding that "the testimonial disqualification sought by [respondent] should not be permitted to stand as a bar to testimony concerning a joint criminal enterprise in which a husband and wife are allegedly both engaged" (*ibid.;* footnote omitted).

The district court stated that "the appropriate analysis in a case involving the testimonial privilege is to 'decide whether the privilege against adverse spousal testimony promotes sufficiently important interests to outweigh the need for probative evidence in the administration of criminal justice.'" Pet. App. 51a, quoting *Trammel* v. *United States,* 445 U.S. 40, 51 (1980). It found that there were "two interests underlying the privilege against adverse spousal testimony: (1) prevention of dissension between spouses which might result from testimony of one against the other; and (2) society's 'natural repugnance' at

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communications (see Pet. App. 57a-58a). Respondent has not invoked her Fifth Amendment privilege against compelled self-incrimination. Were she to invoke that privilege, the government would, of course, have the option of seeking an immunity order in order to gain respondent's testimony. See 18 U.S.C. 6002, 6003.

[3] The court issued an oral ruling on that date (Pet. App. 56a-60a) and more fully explained the reasons for its decision in a written opinion issued one week later (*id.* at 40a-55a).

condemning a person on the compelled testimony of his or her spouse" (Pet. App. 51a). The court concluded that "the recognition of a joint participants exception to the privilege against adverse spousal testimony will not seriously infringe upon the goals underlying that privilege" (*id.* at 54a). It observed that a spouse's testimony was unlikely to cause marital dissension where a husband and wife were partners in crime (*id.* at 53a). In addition, the court was "reluctant to interfere with the sweeping powers of the grand jury in its investigative functions" (*id.* at 54a).

Respondent again refused to answer the questions that had been put to her before the grand jury, and the district court held her in civil contempt of court pursuant to 28 U.S.C. 1826(a).[4] She was committed to jail for 18 months or the term of the grand jury, whichever was shorter, or until she decided to answer the questions. Pet. App. 42a.

2. While respondent's appeal of the district court's order was pending, Karel Koecher was indicted on one count of conspiracy to commit espionage, in violation of 18 U.S.C. 794(c). The overt acts in furtherance of the conspiracy described in the indictment include respondent's delivery to agents of the Czechoslovak Intelligence Service of a classified document obtained by her husband from the Central Intelligence Agency. Indictment at 2, *United States* v. *Koecher,* No. 84 Cr. 1001 (SWK) (S.D.N.Y. Dec. 20, 1984).

The court of appeals subsequently issued an order vacating the order of civil contempt (Pet. App. 16a-18a). It observed that "[i]t is settled law that * * * 'it is not a legitimate function of the grand jury to serve as a substitute for pretrial discovery.' " *Id.* at 17a, quoting 8 J. Moore, *Moore's Federal Practice* ¶ 6.04[5], at 6-86 (1985). The court of appeals remanded the case to the district court for consideration of (1) whether the dominant purpose of questioning respondent was to obtain discovery in connection with her husband's trial on the pending charge, and (2) "whether the particular questions asked by the Government which [respondent] refused to answer fall within the scope of the [marital] privilege, assuming that one exists" (Pet. App. 18a).

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[4] 28 U.S.C. 1826(a) provides that "[w]henever a witness in any proceeding before * * * [a] grand jury of the United States refuses without just cause shown to comply with an order of the court to testify * * *, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony * * *." The period of confinement must end with the expiration of the term of the grand jury and cannot exceed 18 months (*ibid.*).

On remand, the district court concluded that "the continued grand jury investigation after the return of the indictment * * * is not solely or predominantly for the purpose of obtaining evidence for use at the pending trial of that indictment" (Pet. App. 35a). The court found that it was reasonable for the grand jury to seek to develop evidence concerning other members of the conspiracy and any substantive offenses that may have been committed pursuant to the conspiracy (*id.* at 37a). With respect to the second issue, both parties agreed, and the district court found, that the questions posed to respondent before the grand jury fell within the scope of the marital testimonial privilege because the answers "could be potentially adverse to her husband" (*id.* at 32a).[5] Respondent again refused to answer the questions, and the district court held her in contempt and entered the same confinement order as before (*id.* at 20a, 21a-23a).

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[5] On remand, respondent raised for the first time the claim that the government had failed to show that she and her husband were joint participants in the espionage activities. The district court held that this argument was not open on remand (Pet. App. 37a). The court also observed that the indictment "appears to answer the argument" because it "avers that one of the overt acts was committed by [respondent], thus evidencing probable cause to believe that she was a co-conspirator" (*ibid.*). The court noted that the affidavit in support of the material witness warrant "shows probable cause that [respondent] participated in a joint criminal enterprise" (*id.* at 38a).

3. The court of appeals reversed (Pet. App. 1a-15a), holding "in agreement with the Third Circuit and in conflict with the Seventh and Tenth Circuits, that the marital privilege is not subject to a joint participant exception" (*id.* at 8a; footnote omitted). The court first stated that the absence of an express reservation of the issue in this Court's decision in *Trammel* v. *United States, supra,* "has some negative implications as regards the joint participant exception" (Pet. App. 10a). The court of appeals found insufficient policy justification for a joint participant exception to the testimonial privilege. It stated that "while it may well be that the marital privilege should be abolished, we do not see sufficient reason for creating a joint participant exception" (*id.* at 11a).

The court observed, however, that its decision did "not mean that there is not something to be said on the other side" (Pet. App. 11a). It noted that the courts of appeals were in agreement that the confidential marital communications privilege did not apply to communications for criminal ends, but indicated that the reasoning of these decisions did not apply to the testimonial privilege because the former seeks to protect "the intimacy of private marital communications" while the latter "is more broadly aimed at protecting marital harmony" (*id.* at 13a). The court concluded that "[i]n light of its existence since the early days of the common law and of the importance of the interests which the marital privilege serves, we would leave the creation of exceptions to the Supreme Court or to Congress" (*id.* at 14a).[6]

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[6] The term of the grand jury that subpoenaed respondent expired on September 15, 1985, but that event did not render the present case moot. If we prevail before this Court, we will seek to question respondent before a new grand jury. Accordingly, a live controversy exists between the parties, the formal elements of which are virtually certain to recur. See *Gannett Co.* v. *Depasquale*, 443 U.S. 368, 377-378 (1979).

SUMMARY OF ARGUMENT

This case concerns the scope of the privilege against adverse spousal testimony, which enables a witness to withhold testimony relevant to a criminal proceeding on the ground that the testimony would be adverse to the interests of his or her spouse. The court below held that respondent could rely upon the privilege in refusing to answer questions concerning her husband's alleged espionage activities even if she participated in the commission of the offense. This decision misapplies applicable policies governing the construction of testimonial privileges in general and the privilege against adverse spousal testimony in particular. When spouses join forces as partners in crime, the spousal testimonial privilege should not shield them from testifying about their joint illegal activities.

Testimonial privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States* v. *Nixon,* 418 U.S. 683, 710 (1974) (footnote omitted). A privilege accordingly is recognized only when needed to promote societal interests that outweigh the basic principle underlying our criminal justice system—that the public has a right to every person's evidence.

In *Trammel* v. *United States,* 445 U.S. 40 (1980), this Court reaffirmed that in at least some circumstances the privilege against adverse spousal testimony is justified by society's interest in protecting the harmony of the marital relationship. Of course, the privilege does not seek to protect marriage simply as an end in itself. Marriage is an institution of fundamental importance in maintaining society's moral and ethical values, and the societal interest in protecting the marriage relationship is grounded in this fact. Since a testimonial privilege should be recognized only when necessary to further the public interest underlying the privilege, the spousal testimonial privilege should be available only in circumstances in which it substantially furthers the values that society acknowledges in the marital relationship.

When a marriage shelters a criminal partnership, the marriage accords with no value society is concerned to affirm; the spouses' criminal activity is harmful both to society and to one another. Since the spouses' action is completely antithetical to the values society acknowledges in the institution of marriage, a witness-spouse should not be permitted to withhold testimony concerning such joint criminal endeavors. Moreover, permitting a witness to assert the privilege in this context gives criminals an incentive to recruit their spouses to serve as accomplices in criminal activities. So long as the spouse's good will is not alienated, the criminal is assured that the government will not be able to obtain incriminating testimony from the accomplice-spouse.

The court of appeals' contrary decision rests on its view that the privilege should apply in all circumstances in which it might protect the harmony of a marriage, without considering the extent to which the relevant societal interests that give rise to the privilege are in fact implicated. That determination is incorrect. We submit that any such general interest in the harmony of marriage is insufficient to require recognition of the privilege in this context in view of the harmful effect upon society of spouses' joint criminal activity.

Finally, the societal interest in obtaining the testimony of a co-conspirator witness-spouse also weighs against recognition of the privilege. First, the need for such testimony generally is enhanced because of the secretive nature of conspiratorial wrongdoing. Second, because a spouse who is complicit in the criminal activity is more likely to be knowledgeable about the participation of third-party conspirators, recognition of a privilege for co-conspirator spouses is especially likely to have the effect of shielding not just the marital relation, but other participants in the criminal venture as well.

ARGUMENT

A WITNESS MAY NOT REFUSE TO TESTIFY ON THE GROUND THAT SUCH TESTIMONY WOULD BE ADVERSE TO THE INTERESTS OF HIS OR HER SPOUSE WHEN THE TESTIMONY CONCERNS CRIMINAL ACTIVITY IN WHICH THE SPOUSES JOINTLY PARTICIPATED

"Testimonial * * * privileges contravene the fundamental principle that ' "the public . . . has a right to every man's evidence." ' " *Trammel* v. *United States,* 445 U.S. 40, 50 (1980), quoting *United States* v. *Bryan,* 339 U.S. 323, 331 (1950). Our criminal justice system depends upon full disclosure of all relevant facts. When a witness successfully asserts a privilege to withhold evidence from the truth-seeking process, he necessarily impedes society's efforts to bring wrongdoers to justice. *United States* v. *Nixon,* 418 U.S. 683, 709-710 (1974); *Branzburg* v. *Hayes,* 408 U.S. 665, 686-688 (1972). The recognition of a testimonial privilege therefore is appropriate only in the narrow circumstances in which the privilege "promotes sufficiently important interests to outweigh the need for probative evidence in the administration of criminal justice." *Trammel,* 445 U.S. at 51; see also *Branzburg* v. *Hayes,* 408 U.S. at 690-691 (declining to establish newsmen's testimonial privilege because "the public interest in law enforcement and in ensuring effective grand jury proceedings" is stronger than the "burden on news gathering" of requiring reporters to testify); *United States* v. *Bryan,* 339 U.S. at 331-332.

This Court has defined two distinct testimonial privileges grounded in the marriage relationship.[7] The

marital communications privilege bars the admission into evidence of "information privately disclosed between husband and wife in the confidence of the marital relationship." [8] That privilege, which gives focused attention to a particularly important aspect of the marital relationship (*Trammel,* 445 U.S. at 51), is not implicated in this case. At issue here is the privilege against adverse spousal testimony, which permits a witness to refuse to testify if the testimony would be adverse to the interests of the witness's spouse.[9] Since the privilege is not needed to protect confidential communications, it has the effect of "exclud[ing] evidence of criminal acts and of communications made in the presence of third persons" (*ibid.*), or, as in the present case, excluding even evidence of actions done by the witness-spouse.

In *Trammel,* this Court undertook a comprehensive review of the interests underlying the privilege against adverse spousal testimony. The privilege has its roots in the medieval rule that " 'a wife cannot be produced either against or for her husband' " (445 U.S. at 44, quoting 1 E. Coke, *A Commentarie Upon Littleton* 6b (1628)). This principle, in turn, rested upon two legal doctrines: "first, the rule that an accused was not permitted to testify in his own behalf because of his interest in the proceeding; second, the concept that husband and wife were one, and that since the woman had no recognized separate legal existence, the husband was that one" (*Trammel,* 445 U.S. at 44).

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[7] The testimonial privileges available to witnesses in federal criminal proceedings are not fixed by statute or rule; the federal courts define rules of testimonial privilege on a case-by-case basis in accordance with "the principles of the common law as they may be interpreted * * * in the light of reason and experience." Fed. R. Evid. 501; see also *Trammel* v. *United States,* 445 U.S. at 47.

[8] *Trammel,* 445 U.S. at 51; see also *id.* at 45 & n.5; *Blau* v. *United States,* 340 U.S. 332 (1951); *Wolfle* v. *United States,* 291 U.S. 7 (1934).

[9] *Trammel,* 445 U.S. at 53; see generally *id.* at 43-53; 8 J. Wigmore, *Evidence* §§ 2227-2245 (McNaughton rev. 1961).

This Court concluded in *Trammel* that the privilege could not be justified by reference to these "long-abandoned" legal doctrines (445 U.S. at 44, 52). Nevertheless, although it acknowledged that the privilege had been "sharply criticized" (*id.* at 44; footnote omitted), the Court did not completely eliminate the privilege. It held that "[t]he modern justification for th[e] privilege * * * is its perceived role in fostering the harmony and sanctity of the marriage relationship." *Ibid.*; see also *id.* at 52.[10] Applying this rationale, the Court rejected the traditional rule allowing a defendant to invoke the privilege to prevent voluntary adverse testimony by his or her spouse. It found that "[w]hen one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve" (*id.* at 52). The Court concluded that "[t]his modification [of the privilege] * * * furthers the important public interest in marital harmony without unduly burdening legitimate law enforcement needs" (445 U.S. at 53).

This case presents another situation in which the scope of the privilege against adverse spousal testimony must be limited to conform to the privilege's modern rationale. When spouses choose to convert their marriage into a criminal partnership, they forfeit any right to societal protection from inquiries into their joint criminal activities.[11]

A. The Policies Underlying the Privilege Against Adverse Spousal Testimony Are Not Furthered When the Privilege Is Invoked To Withhold Testimony About Spouses' Joint Criminal Activity

The threshold inquiry in determining whether the privilege against adverse spousal testimony should be recognized in this context is how far, if at all, the application of the privilege furthers the societal interests that the privilege is designed to protect. We submit that the interests underlying the privilege plainly are not served by permitting respondent to withhold testimony about criminal conduct in which she and her husband jointly participated, and that therefore the privilege should not apply.

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[10] Compelling a witness to testify against a spouse is considered to place a strain upon the marital relationship. Professor Wigmore rejected this basis for the privilege, observing that "[w]hen one thinks of the multifold circumstances of life that contribute to cause marital dissension, the liability to give unfavorable testimony appears as only a casual and minor one, not to be exaggerated into a foundation for so important a rule." 8 Wigmore, *supra*, § 2228, at 216; see also *Hawkins* v. *United States*, 358 U.S. 74, 77 (1958) ("it seems probable that much more bitterness would be engendered by voluntary testimony than by that which is compelled"); *id.* at 81-82 & n.4 (Stewart, J., concurring) (questioning assumptions underlying privilege).

[11] The court of appeals stated that this Court's decision in *Trammel* "has some negative implications as regards the joint participant exception," apparently because this Court chose to decide that case on a different ground without expressly reserving the question of the existence of a joint participant exception (Pet. App. 10a). We argued in *Trammel* (78-5705 U.S. Br. at 25-29) that the court of appeals in that case correctly recognized a joint participant exception to the privilege, but the broader principle adopted by the Court was our preferred argument (*id.* at 16-25). Since the Court did not address the former issue in *Trammel*, and resolution of that issue was not necessary to the Court's decision, there simply is no basis for the court of appeals' speculation that *Trammel* sub silentio rejected a joint participant exception. See *United States* v. *Clark*, 712 F.2d 299, 301 n.1 (7th Cir. 1983).

Respondent claims (Br. in Opp. 16-17) that *Trammel* settled this issue because the Court in that case balanced the relevant considerations and did not eliminate the privilege. Although the application of the privilege in a particular case does not depend upon an entirely ad hoc balancing of interests, it surely is appropriate for this Court to examine the relevant considerations with respect to identifiable classes of cases. For example, the *Trammel* Court observed that there is an exception to the privilege "for cases in which one spouse commits a crime against the other" (445 U.S. at 46 n.7). In our view, examination of the relevant factors demonstrates that an exception also is warranted when spouses act as partners in crime.

The privilege seeks to protect marital harmony because of the benefits that society acknowledges in the marriage relationship. These benefits are obliterated when spouses join forces as partners in crime; indeed, the spouses' criminal activity is nothing less than a direct attack upon society. Although the personal interests of spouses engaged in joint criminal activity undoubtedly would be furthered by upholding an assertion of the privilege with respect to testimony about their crimes, society itself would be ill-served by that result. Moreover, the availability of the privilege in these circumstances would give criminals an incentive to recruit their spouses to serve as accomplices in criminal activities, thereby undermining the very relationship that the privilege seeks to protect.

1. Courts recognize testimonial privileges because " 'permitting a refusal to testify or excluding relevant evidence has a *public good* transcending the normally predominant principle of utilizing all rational means for ascertaining truth.' " *Trammel,* 445 U.S. at 50 (emphasis added), quoting *Elkins* v. *United States,* 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting); see also page 10, *supra.* For example, the attorney-client privilege protects confidential communications between client and attorney in order to promote the attorney-client relationship. The privilege rests upon the principle that "sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by
⊙ the client" *Upjohn Co.* v. *United States,* 449 U.S. 383, 389 (1981); see also *Fisher* v. *United States,* 425 U.S. 391, 403 (1976).

Since the privilege is designed to maintain the confidentiality of attorney-client communications, it at first might seem appropriate to construe the privilege to bar the disclosure of all of these communications. Such a rule undoubtedly would provide the greatest possible impetus to the free exchange of information because clients could be certain that their confidences would be respected. It is

settled, however, that the privilege does not apply to all confidential communications. If the privileged relationship has been abused so that, in a particular type of circumstance, the assertion of the privilege will not promote the "public good" the privilege is intended to advance, the privilege does not apply. Cf. *Fisher* v. *United States,* 425 U.S. at 403 (attorney-client privilege "applies only where necessary to achieve its purpose"); 8 J. Wigmore, *Evidence* § 2192, at 73 (McNaughton rev. 1961) (privileges should be "recognized only within the narrowest limits required by principle").

Thus, the attorney-client privilege cannot be asserted by a client "who consults an attorney for advice that will serve him in the commission of a fraud." *Clark* v. *United States,*
1, 289 U.S. 15 (1983); see also *United States* v. *Horvath,* 731 3
F.2d 557, 562 (8th Cir. 1984); *United States* v. *Dyer,* 722 F.2d 174, 177 (5th Cir. 1983); *In re Special September 1978 Grand Jury (II),* 640 F.2d 49, 59 (7th Cir. 1980); *United States* v. *Mardian,* 546 F.2d 973, 982 (D.C. Cir. 1976) (en banc). The purpose of the privilege is to encourage clients to consult with attorneys when legal counsel would serve a legitimate purpose; society has no interest in allowing criminals to obtain advice to aid them in the commission of future crimes. Since society derives no benefit from such consultations, and would be harmed if legal assistance were available to help shield those planning crimes from detection, communications regarding future illegal acts are not protected from disclosure. See *In re Grand Jury Subpoena Duces Tecum,* 731 F.2d 1032, 1038 (2d Cir. 1984); *United States* v. *Dyer,* 722 F.2d at 177; 8 Wigmore, *supra,* § 2298, at 573.[12]

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[12] The same approach is reflected in this Court's analysis of the privilege against disclosure of jurors' deliberations. That privilege seeks to further the "public policy" that "[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." *Clark* v. *United States,* 289 U.S. 1, 13 (1933). In *Clark,* a

The general principles that govern the scope of the attorney-client privilege also apply in construing the privilege against adverse spousal testimony. This privilege resembles other testimonial privileges in that its purpose is related to a "public good"; *Trammel* itself refers to the "*public interest* in marital harmony" (445 U.S. at 53 (emphasis added)). Society seeks to protect marital harmony—and thereby protect marriages—because marriage is an institution the value of which is acknowledged by society. Marriage is the foundation of the family, and "[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore* v. *City of East Cleveland,* 431 U.S. 494, 503-504 (1977) (plurality opinion; footnote omitted). A marriage places husband and wife in a stable, supportive relationship that encourages productive behavior and discourages antisocial conduct. As the Seventh Circuit has observed, "marriage * * * may conceivably be an important institution contributing to the rehabilitation of the defendant spouse." *United States* v. *Van Drunen,* 501 F.2d 1393, 1397 (7th Cir.), cert. denied, 419 U.S. 1091 (1974). The privilege thus seeks to "foster family peace, not only for the benefit of husband, wife, and children, *but for the benefit of the public as well.*" *Hawkins* v. *United States,* 358 U.S. 74, 77 (1958) (emphasis added).

As is the case with other testimonial privileges, the construction of the privilege against adverse spousal testimony should be guided by the public policy underlying the privilege. This Court accordingly has declined to recognize the privilege to protect conduct that is inconsistent with the values society acknowledges in the marriage relationship. In *Wyatt* v. *United States,* 362 U.S. 525 (1960), the husband was prosecuted for violating the Mann Act by transporting his wife for purposes of prostitution. The Court held that the wife could be compelled to testify against her husband because the privilege against adverse spousal testimony does not bar testimony about offenses committed by one spouse against the other. 362 U.S. at 526; see also *Trammel,* 445 U.S. at 46 n.7 (noting that this exception also has been applied to crimes against a spouse's property and crimes against the spouses' children).

When spouses join together to commit unlawful acts against third parties or against society, they act in a manner that is totally inconsistent with the values society acknowledges in the institution of marriage, and the testimonial privilege accordingly should not apply. These spouses use their marriage as a base for attacking society through criminal activity, rather than as a refuge in which to nurture the values treasured by society. See *United States* v. *Trammel,* 583 F.2d 1166, 1170 (10th Cir. 1978), aff'd, 445 U.S. 40 (1980) ("[t]here [is] no domestic harmony in the commonly accepted nature of a marital relationship to be preserved following commencement of * * * criminal activities"). The relationship is no more beneficial to society than any other criminal conspiracy. In addition, the possibility that the marriage will have a rehabilitative effect is diminished if both spouses participated in the crime. *United States* v. *Clark,* 712 F.2d at 301; cf. *Callanan* v. *United States,* 364 U.S. 587, 593 (1961) (partnership in crime "decreases the probability that the individuals involved will depart from their path of criminality"). Finally, the spouses' conduct is harmful to one

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juror was held in criminal contempt for intentionally giving false responses to questions during voir dire. This Court held that the privilege did not bar testimony concerning the juror's conduct and statements during the deliberations, in aid of the inquiry whether the juror had lied. *Id.* at 13-16. The Court found that the policy in favor of protecting jurors' independent judgment would not be furthered by barring such testimony and that the need to maintain the jury as "pure and undefiled" weighed in favor of creating an exception to the privilege. *Id.* at 16.

another in that each aids and encourages the other in commission of an illegal act.[13]

Since joint criminal activity by spouses is directly contrary to the societal values the privilege acknowledges, and harms both society and the spouses themselves, "reason and experience" (Fed. R. Evid. 501) tell us that the privilege should not be applied as the court of appeals has applied it here. The loss of probative evidence from the truth-seeking process would not be sufficiently offset by any corresponding benefit to society in this context; society plainly does not benefit by aiding a relationship that, in the present case, was the basis of an attempt to subvert society itself. Spouses who engage in joint criminal activity accordingly should be held to give up any right to assert the privilege to shield testimony about their conduct.

It should be noted that the exception for which we contend is limited in scope. We do not assert that spouses lose all of the protection of the privilege when they jointly commit crimes; adverse spousal testimony may be compelled only with respect to the joint criminal activity. We submit that this interpretation of the privilege properly accommodates the societal interests that are the basis for the privilege with the interest in detection of wrongdoing and accurate trial outcomes.[14]

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[13] Respondent herself acknowledges (Br. in Opp. 18) that "when spouses act as partners in crime, their behavior is antithetical to society's values."

[14] The court of appeals stated that it was reluctant to establish a joint participant exception because of "the difficulty often encountered in establishing the predicate without invading the privilege." Pet. App. 13a-14a (footnote omitted). But courts have not encountered unmanageable difficulties in connection with the joint participant exception to the attorney-client privilege and the marital communications privilege, and there is no reason to believe that a different result would obtain here. For the exception to apply, the government would be required to make a prima facie showing, based upon independent evidence, that the spouses jointly participated in the criminal activity that is the subject of the testimony. Cf. *Clark* v.

2. A joint participant exception to the privilege against adverse spousal testimony is warranted for the additional reason that allowing a witness-spouse to withhold testimony about joint crimes actually gives criminals an incentive to recruit their spouses as accomplices in unlawful ventures. The Seventh Circuit has observed that the "goal [of preserving the family] does not justify assuring a criminal that he can enlist the aid of his spouse in a criminal enterprise without fear that by recruiting an accomplice or coconspirator he is creating another potential witness." *United States* v. *Van Drunen,* 501 F.2d at 1396; see also *United States* v. *Clark,* 712 F.2d at 301-302. This Court expressed a similar view in *Trammel,* noting that the privilege against adverse spousal testimony had been criticized on the ground that it " 'secures, to every man, one safe and unquestionable and ever ready accomplice for every imaginable crime' " (445 U.S. at 52, quoting 5 J. Bentham, *Rationale of Judicial Evidence* 338 (1827)).

One looking for assistance in carrying out a criminal scheme naturally will choose as an accomplice an individual who is considered to be unlikely to cooperate with law enforcement authorities. *United States* v. *White,* 401 U.S. 745, 752 (1971) (plurality opinion). If the privilege against adverse spousal testimony is absolute, an accomplice-spouse has the option of deciding whether or not

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United States, 289 U.S. at 15. The privilege could not be overcome until after the government established this predicate.

For example, the government's offer of proof with respect to this issue in the present case, which was not contested by respondent in the initial district court proceedings, rested upon statements made to FBI agents by both respondent and her husband that established the spouses' joint participation in the espionage activities. See Nov. 29, 1984 Tr. 6 (sealed); Dec. 4, 1984 Tr. 19; see also pages 2-3, *supra.* The out-of-court statements of respondent's husband are admissible to establish the factual basis for the joint participant exception. See Fed. R. Evid. 104(a) (hearsay rules do not apply to "[p]reliminary questions concerning * * * the existence of a privilege"). Moreover, had respondent contested this issue, the government would have produced additional evidence concerning respondent's participation in the offense.

to testify; the government could require any other accomplice to testify pursuant to a grant of immunity. A spouse thus has a clear advantage as a potential partner in crime, which this case in fact demonstrates. If respondent's husband had selected any accomplice other than his wife, the government could have compelled the accomplice to testify before the grand jury; because respondent was aided by his wife, she has been able to hamper the government's investigation. The privilege accordingly encourages the abuse of the very relationship that it is designed to protect.

B. The Court Of Appeals Erred Because It Misinterpreted The Principle Underlying The Privilege Against Adverse Spousal Testimony

The court of appeals' decision upholding respondent's assertion of the privilege against adverse spousal testimony rests on its different view of the principle underlying the privilege. The court asserted that the privilege reflects an interest in preserving all marriages and that the privilege therefore should apply as long as the spouses' relationship remains viable; the fact that the marriage shelters a criminal relationship was deemed completely irrelevant. Thus, the court of appeals justified its refusal to recognize a joint participant exception to the privilege by stating that it was "unable to accept the proposition that a marriage cannot be a devoted one simply because at some time the partners have decided to engage in a criminal activity" (Pet. App. 11a).[15]

There are two basic flaws in this argument. First, even if the privilege does rest on a general interest in protecting marriages from outside pressure, the force of this consideration is materially different in the ordinary case from what it is in the case of joint criminal ventures. If respondent were an innocent witness-spouse called to testify against her husband, she would be placed in a dilemma not of her making. She would have had nothing to do with the decision to engage in criminal activity, but her marriage could be adversely affected if she were forced to testify against her husband. Because respondent and her husband jointly engaged in criminal activity, however, the permissibility of compelling her testimony is a result of the spouses' *joint* decision to engage in criminal activity. Since any threat to marital harmony is not the result of unilateral action by one spouse, but is essentially self-imposed, the basis of the privilege is largely undermined.

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[15] The court of appeals suggested that the privilege is supported by the " '*natural repugnance* in every fair-minded person to compelling a wife or husband to be the means of the other's condemnation and * * * [subjecting the defendant] to the humiliation of being condemned by the words of his intimate life partner' " (Pet. App. 14a, quoting 8 Wigmore, *supra,* § 2228, at 217 (emphasis in original)), and respondent also refers to this concept (Br. in Opp. 13, 15). To the extent this statement has any substantive content at all, it appears to be simply a restatement of the claim that the purpose of the privilege is to promote spouses' happiness in their marriages. First, Professor Wigmore, the source of the court of appeals' description of this "interest," correctly characterizes it as "not more than a sentiment" that "does not posit any direct and practical [evil] consequence." He views "repugnance" as an insufficient justification for a testimonial privilege. 8 Wigmore, *supra,* § 2228, at 217. Second, this Court in *Trammel* did not identify any such "natural repugnance" as the basis for the privilege; indeed, the holding that the privilege does not bar voluntary spousal testimony is an implicit rejection of the view that the defendant should not be "humiliat[ed]" by the adverse testimony of a spouse. Third, the widespread criticism that has been directed against the spousal testimonial privilege (see pages 25-26, *infra*) undercuts any argument that society at large views such testimony as naturally "repugnant".

Finally, whatever the correctness of this view when the testifying spouse is an innocent bystander, it surely describes no universal sentiment with respect to the prospect that one spouse may be required to testify against the other concerning a crime in which both spouses jointly participated. At that point, "fair-minded person[s]" are likely to view the spouses as criminal conspirators who abused their marriage, not as an unfortunate husband and wife who should be encouraged to shelter one another.

Second, the general societal interest in the preservation of marriage postulated by the court below is not by itself sufficient to require recognition of the privilege regardless of other applicable considerations. When the privilege is invoked by an innocent witness-spouse, application of the privilege is supported by both the more focused interest in marriages which fulfill the socially beneficial role discussed above and the general interest in the preservation of all viable marriages relied upon by the court of appeals. These interests diverge in the present context, and it is our submission that a general interest in the preservation of marriage—divorced from the values that society seeks to promote through the marital relationship—is simply insufficient to outweigh the cost in terms of the impediments to the detection of crime and the loss of probative evidence from the truth-seeking process. Cf. *United States* v. *Nixon,* 418 U.S. at 709 (Court observed that testimonial privileges are not lightly created but should protect only "weighty and legitimate * * * interests" and refused to recognize absolute executive privilege); *Branzburg* v. *Hayes,* 408 U.S. at 688-708 (declining to recognize journalist's privilege grounded in the First Amendment).[16]

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[16] Respondent intimates (Br. in Opp. 11) that her interpretation of the privilege is justified by "the constitutional status of the marital relationship as a basic human right." However, this Court's decisions recognizing a right to be free of government intrusion when making decisions on intimate matters (see, *e.g.*, *Griswold* v. *Connecticut,* 381 U.S. 479 (1965)) have no application in construing a general privilege relating to nonconfidential evidence about criminal activities.

Similarly, respondent cannot argue that the failure to recognize the privilege in this context constitutes impermissible interference with the right to marry. Compare *Zablocki* v. *Redhail,* 434 U.S. 374 (1978) (statute restricting right to marry held violative of Equal Protection Clause); *Loving* v. *Virginia,* 388 U.S. 1 (1967) (same). In *Califano* v. *Jobst,* 434 U.S. 47 (1977), the Court upheld a provision of the Social Security Act that tied certain benefits to marital status. The Court found that Congress's rational choice concerning the availability of benefits was "not rendered invalid simply because some persons who

This conclusion is supported by the unanimous view, among the courts of appeals that have addressed the issue, that the marital communications privilege does not shield confidential communications between a husband and wife in furtherance of the spouses' joint criminal activity.[17] The communications privilege has the same basic purpose as the testimonial privilege—the protection of the marital relationship. See *Wolfle* v. *United States,* 291 U.S. 7, 14 (1934); 8 Wigmore, *supra,* § 2332, at 642. It serves this purpose by encouraging spouses to feel secure in the privacy of revelations to one another regarding their feelings and experiences. Because communications regarding spouses' joint crimes have nothing to do with the interests promoted by the marital communications privilege, they are excluded from its protection. See *United States* v. *Byrd,* 750 F.2d 585, 594 (7th Cir. 1984); *United States* v. *Mendoza,* 574 F.2d 1373, 1380-1381 (5th Cir.), cert. denied, 439 U.S. 988 (1978); *United States* v. *Kahn,* 471 F.2d 191, 194 (7th Cir. 1972), cert. denied, 411 U.S. 986 (1973), rev'd on other grounds, 415 U.S. 143 (1974); see also Note, *The Future Crime or Tort Exception to Communications Privileges,* 77 Harv. L. Rev. 730, 734 (1964) ("conduct sought by one spouse that is unambiguously illegal would seem outside the area of desired husband-wife

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might otherwise have married were deterred by the rule or because some who did marry were burdened thereby." *Id.* at 54 (footnote omitted). For the same reasons, the Constitution cannot be violated by the recognition of an exception to a testimonial privilege in order to further or to discourage subversion of the relevant societal values.

[17] See *United States* v. *Sims,* 755 F.2d 1239 (6th Cir. 1985), cert. denied, No. 84-6631 (July 1, 1985); *United States* v. *Broome,* 732 F.2d 363, 365 (4th Cir. 1984), cert. denied, No. 84-118 (Oct. 1, 1984); *United States* v. *Ammar,* 714 F.2d 238, 258 (3d Cir.), cert. denied, 464 U.S. 936 (1983); *United States* v. *Entrekin,* 624 F.2d 597, 598 (5th Cir. 1980), cert. denied, 451 U.S. 971 (1981); *United States* v. *Price,* 577 F.2d 1356, 1364-1365 (9th Cir. 1978), cert. denied, 439 U.S. 1068 (1979); *United States* v. *Kahn,* 471 F.2d 191, 194-195 (7th Cir. 1972), cert. denied, 411 U.S. 986 (1973), rev'd on other grounds, 415 U.S. 143 (1974).

intimacy, so that the admission of related communications would be unlikely to hinder favored discussion").

These decisions establish that even when the purpose of a privilege is to protect marital harmony, the privilege must be construed by reference to society's general interests. In view of the courts' conclusion that communications regarding joint crimes are not protected because they are antithetical to society's concept of the marital relationship, the spousal testimonial privilege—which also seeks to promote the marital relationship—should similarly be limited by reference to these societal values.[18]

In addition, the court of appeals' reference to a general interest in the harmony of all marriages resembles the arguments advanced in support of a "family" privilege protecting the parent-child relationship and other family relationships. The courts of appeals uniformly have rejected these claims, finding insufficient justification for the creation of such a privilege despite the obvious importance and substantiality of the relationships in question. See, *e.g.*, *United States* v. *Davies*, No. 84-1239 (7th Cir. July 25, 1985); *In re Grand Jury Subpoena of Santarelli*, 740 F.2d 816 (11th Cir. 1984); *In re Matthews*, 714 F.2d 223 (2d Cir. 1983); *United States* v. *Jones*, 683 F.2d 817 (4th Cir. 1982).[19]

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[18] The court below rejected this analogy on the ground that the two privileges are supported by different rationales (Pet. App. 12a-13a), but the distinctions between the privileges are not relevant to the present issue. The privileges do have different functions—one protects confidential communications and the other permits spouses to withhold incriminating evidence—but both are intended to serve the same purpose: the protection of the marital relationship so that society can gain the benefits of that relationship. Since that goal does not require the protection of spouses' confidential communications regarding their joint criminal activities, it should not require the application of the testimonial privilege to permit a witness to refuse to testify about such joint crimes.

[19] As originally proposed by this Court in connection with the attempt, abandoned by Congress, to establish detailed rules governing

We do not dispute the court of appeals' proposition that a marriage can be a "devoted" one even if it is between partners in crime. The question is whether reason and experience suggest that the goal of encouraging that marital devotion is sufficiently worthy in the circumstances of cases like this one to require recognition of the privilege. In answering this question for the federal courts, it is noteworthy that the recognition of any privilege against adverse spousal testimony has been "sharply criticized" (*Trammel*, 445 U.S. at 44-45, 48-50 (footnote omitted)). Distinguished commentators on the law of evidence have characterized the privilege as an "anachronism" (8 Wigmore, *supra*, § 2228, at 221) and an "archaic survival" (E. Cleary, *McCormick on Evidence* § 66, at 162-163 (3d ed. 1984)). In addition, the privilege has been abolished in several model codes of evidence. Unif. R. Evid. 23(2); Model Code of Evidence Rule 215 (1942). Finally, as this Court observed in *Trammel*, recognition of the privilege in state law has eroded (445 U.S. at 48-49 & n.9), and

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privileges, Rule 505(c)(2) of the Federal Rules of Evidence would have provided that the privilege against adverse spousal testimony did not apply to "matters occurring prior to the marriage." See 56 F.R.D. 183, 244-245 (1972). The Advisory Committee concluded that this exception was justified because it "eliminate[d] the possibility of suppressing testimony by marrying the witness." *Id.* at 246; see also *United States* v. *Clark*, 712 F.2d at 302; *United States* v. *Van Drunen*, 501 F.2d at 1397; but see *Wyatt* v. *United States*, *supra* (defendant married witness after the commission of the offense, Court held privilege inapplicable on another ground without discussing an exception to the privilege for pre-marriage facts); *United States* v. *Apodaca*, 522 F.2d 568, 570 (10th Cir. 1975) (implicitly rejecting argument that privilege does not apply to pre-marriage facts). This exception to the privilege would, of course, have been wholly inconsistent with the court of appeals' rationale here that the privilege is, in effect, wholly forward-looking and must be made available whenever it might operate to assist the future harmony of a viable marriage. For the same reasons that the drafters of the Rules of Evidence did not find that interest paramount in the context of post-offense marriages, it is insufficient to justify the rule propounded by the court of appeals here.

this trend has continued in the years since *Trammel* was decided. See Iowa Code Ann. § 622.7 (West Supp. 1985) (repealed); *State* v. *Freeman,* 302 N.C. 591, 276 S.E.2d 450 (1981).[20] The Court decided in *Trammel* not to implement this widely-held view that the privilege is not needed to preserve the marriage relationship, adopting instead an intermediate position that retained the privilege only where it was most likely to serve its goals at an acceptable cost. We ask for nothing more in the present context.[21]

C. The Government's Interest In Obtaining Spousal Testimony Is Greater When The Testimony Relates To The Spouses' Joint Criminal Activity

The second element considered in the balancing test established in *Trammel*—society's "need for probative evidence in the administration of criminal justice" (445 U.S. at 51)—also weighs against the application of the privilege in these circumstances. We acknowledge that the decision to recognize the marital testimonial privilege at all entails a willingness to accept some cost of losing valuable evidence in criminal proceedings. But the costs are significantly greater when the witness-spouse is a participant in the crime under investigation because of the increased likelihood that the privilege will operate to benefit not simply the defendant-spouse, but also third parties who join with the spouses to commit unlawful acts. When the witness-spouse participates in the crime, it is quite likely that he or

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[20] We have not located any state court decisions addressing a joint participant exception to the privilege against adverse spousal testimony.

[21] The conclusion that the privilege should not be recognized in these circumstances does not mean that these marriages are in some way improper or that they should not survive. It simply embodies the conclusion that joint criminal behavior by spouses is so antithetical to our concept of marriage that society should not bear the cost of protecting these spouses from the consequences of that joint behavior.

she will meet the other conspirators and have knowledge of the workings of the illicit venture, and therefore be in a position to testify against third parties.[22] However, if both the nontestifying spouse and the other conspirators are targets of the same grand jury or are tried together, the assertion of the privilege against adverse spousal testimony will have the effect of protecting the third-party conspirators as well as the nontestifying spouse, even though the privilege was never intended to cast its protective net so broadly.

Arguably, the government could avoid this result by investigating the nontestifying spouse through a separate grand jury and prosecuting the spouse at a separate trial, but these measures are far from satisfactory. Severence burdens the resources of the criminal justice system and increases the risk of inaccurate verdicts by depriving a single jury of the opportunity to assess blame. Moreover, there is a distinct possibility that such inconvenient measures also would be held inadequate because of the risk that derivative use of the testimony will somehow be made against the protected spouse.[23]

If the scope of protection afforded by the marital privilege resembles that given the constitutional privilege against compelled self-incrimination, the government may be disabled from securing the testimony of a married person against third parties unless it is prepared to grant immunity covering any use of the witness's testimony—indirect as well as direct—against the witness's spouse. See *Kastigar* v. *United States,* 406 U.S. 441, 459-461 (1972). Because as a practical matter use immunity often renders subsequent prosecution infeasible, recognition of the privilege may preclude or seriously inhibit effective prosecution of a third-party conspirator, the nontestifying spouse, or both. The most sensible solution to these difficulties is to recognize a joint participant exception to the privilege, which will cover many of the cases in which the witness-spouse is most likely to be able to use the privilege to shield third-parties.

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[22] Of course, even a witness-spouse who is not a member of a conspiracy may be able to provide evidence against other conspirators; plainly, however, a member of a conspiracy will far more frequently possess information about the conspiracy than will a stranger to it.

[23] The lengths to which the witness-spouse may go in asserting the privilege are illustrated by the decision in *In re Grand Jury Matter,* 673 F.2d 688 (3d Cir.), cert. denied, 459 U.S. 1015 (1982). The court held in that case that the witness could invoke the privilege to withhold testimony from a grand jury even though the government had made a commitment that the witness's husband would not be indicted by the grand jury that heard her testimony. The court found that the privilege applied because witness-spouse might implicate a third party who might then implicate the witness's husband. The effect of barring the wife's testimony was to protect all of the members of the conspiracy.

Moreover, regardless of whether the conspiracy includes third parties or is limited to the spouses themselves, the privilege's adverse effect on the government's ability to apprehend wrongdoers is especially damaging because, as this Court has recognized (*Callanan* v. *United States,* 364 U.S. at 593-594), conspiratorial activity poses an increased threat to society:

> Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish.

The present case illustrates these observations. The criminal partnership between respondent and her husband was directed toward the crime of espionage, a grave offense threatening the very security of our nation. Moreover, espionage by its nature is a difficult offense to investigate. Participants in the crime often are beyond the

reach of law enforcement because they are located in foreign countries or entitled to rely upon diplomatic immunity. Permitting respondent to invoke the privilege therefore is likely to impede substantially the government's vital law enforcement efforts in this area.[24]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1985

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[24] Respondent asserts (Br. in Opp. 18-20) that the interest in obtaining probative evidence does not weigh against the recognition of the privilege in this context because even if the privilege is not available spouses will refuse to testify against one another. That could of course also be said of parent and child, lovers, or even in some circumstances close friends or business associates. However, the civil contempt remedy is founded on the view that a period of imprisonment may change a prospective witness's willingness to testify. See generally *Shillitani* v. *United States,* 384 U.S. 364, 368-372 (1966). There is no reason that this principle should not apply here, especially in view of the fact that a substantial number of states do not recognize the privilege at all. Presumably spouses do sometimes bend to society's demand that they testify in proceedings in those jurisdictions, and they would decide to do so in federal proceedings as well.

RESPONDENT'S

BRIEF

Supreme Court, U.S.
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No. 84-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

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UNITED STATES OF AMERICA,
Petitioner,

—v.—

HANA KOECHER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Should this Court create an exception to the privilege of a spouse not to testify against her marriage partner, recognized by this Court in *Trammel* v. *United States*, 445 U.S. 40 (1980), and deeply rooted in common-law tradition and constitutional concerns for family privacy, where the government claims that the spouses were joint participants in criminal activity?

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BRIEF FOR THE RESPONDENT

STATEMENT

This case concerns the government's efforts to compel respondent Hana Koecher, against her will and in violation of the long-standing marital testimonial privilege recognized by this Court in *Trammel* v. *United States*, 445 U.S. 40 (1980), to give testimony potentially adverse to her husband, Karel F. Koecher, before a grand jury that has already indicted him and that continues to investigate his activities with a view to bringing further charges against him.

1. Karel and Hana Koecher have been married for more than 22 years. On November 27, 1984, following some ten days of interrogation by agents of the Federal Bureau of Investiga-

tion (FBI), Mr. and Mrs. Koecher were arrested pursuant to warrants issued earlier that day. Karel Koecher was charged in a complaint signed by a special agent of the FBI with conspiring to transmit national defense documents to a foreign government in violation of 18 U.S.C. § 794. His wife Hana was not charged with any crime. Rather, she was detained as a material witness, and subpoenaed to appear before a grand jury investigating the charge against her husband. Pet. App. 1a-2a.

The circumstances of the arrest were highly unusual. Karel Koecher had been employed by the Central Intelligence Agency from 1973 to 1975, and the events that are the subject of the charges against him occurred during that period. Nevertheless, all of the allegations in the complaint against him and the material witness affidavit concerning his wife are drawn from statements alleged by the agent to have been made by Mr. Koecher during the lengthy interrogation immediately preceding his arrest, nearly ten years after the relevant events, and not from any extrinsic evidence. C.A. App. 95-99.[1]

2. When Mrs. Koecher appeared before the grand jury, she declined to answer questions put to her concerning the alleged conspiracy, explicitly invoking the marital testimonial privilege. On December 4, 1984, on the government's motion, Mrs. Koecher was held in civil contempt by the United States District Court for the Southern District of New York.[2] That court held that the marital testimonial privilege was subject to an exception where husband and wife were joint participants in

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[1] In his own case, Mr. Koecher has moved to suppress these statements, contending *inter alia* that they were involuntary, having been extracted by promises of immunity and other benefits. The motion remains pending. *See United States* v. *Karel Koecher*, Dkt. No. 84 Cr. 1001 (SWK) (S.D.N.Y. 1984), transcript of suppression hearings dated November 12-14, 1985.

[2] The court issued an oral opinion on December 4 (Pet. App. 56a-60a), and entered a written opinion on December 11, 1984. Pet. App. 40a-50a.

criminal activities.[3] The court did not make an explicit finding of fact concerning Mrs. Koecher's alleged participation in the offense charged; rather, noting only that the government had "made an offer of proof concerning the alleged joint criminal enterprise" (consisting of the complaint and material witness affidavit already referred to), the court ruled that Mrs. Koecher had no privilege not to testify "concerning a joint criminal enterprise in which a husband and wife are *allegedly* both engaged." Pet. App. 41a-42a & n. 3 (emphasis added).[4]

The court refused to stay its order pending appeal. Mrs. Koecher was incarcerated, and remained in jail for nearly four months before being released on bail after the contempt order was ultimately reversed by the Court of Appeals.[5]

3. While Mrs. Koecher's appeal of the contempt adjudication was pending, the grand jury returned an indictment

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[3] This purported exception has been endorsed by the Seventh and Tenth Circuits, in each case as an alternate ground of decision. *United States* v. *Van Drunen*, 501 F.2d 1393 (7th Cir.), *cert. denied*, 419 U.S. 1091 (1974); *United States* v. *Trammel*, 583 F.2d 1166 (10th Cir. 1978), *aff'd on other grounds*, 445 U.S. 40 (1980); *United States* v. *Clark*, 712 F.2d 299 (7th Cir. 1983). The exception has been squarely rejected by the Third Circuit, *In re Malfitano*, 633 F.2d 276 (3d Cir. 1980); *In re Grand Jury Matter*, 673 F.2d 688 (3d Cir.), *cert. denied*, 459 U.S. 1015 (1982), as well as by the Second Circuit in the instant case.

[4] The government misleadingly asserts that "[r]espondent did not contest the government's claim that she was involved in the espionage scheme." Br. 4. In support of this assertion, the government cites only Mrs. Koecher's statement to the grand jury invoking the marital privilege, a blanket legal claim that certainly cannot be construed as an admission of any wrongdoing. *Id.*, citing Pet. App. 2a-3a, 40a-41a. The government ignores the fact that Mrs. Koecher has, throughout these proceedings, asserted that she is innocent of participation in any conspiracy, and that the government has failed to prove the contrary. This assertion has been made to the FBI (Pet. App. 14a), to the District Court (Pet. App. 37a), and to the Court of Appeals (Pet. App. 8a).

[5] Mrs. Koecher had been incarcerated since her and her husband's arrest on November 27, pending setting of bail on the material witness warrant. She would not be released until March 21, 1985, nearly four months later.

charging Karel Koecher in a single count with conspiracy to violate § 794. The Court of Appeals thereupon vacated the contempt adjudication and remanded for a determination whether the grand jury was being improperly abused to prepare for trial of that indictment. Pet. App. 61a-62a.

On January 30, 1985, the District Court again held Mrs. Koecher in contempt (Pet. App. 19a-20a), after finding that the grand jury was continuing to investigate, among other matters, "whether other offenses than that in the one count indictment should be charged against" Mr. Koecher. Pet. App. 34a. In response to Mrs. Koecher's argument that the government had not shown that she was in fact a participant, the court first ruled that the issue was outside the scope of the Court of Appeals' remand. It then went on to observe that the material witness affidavit "shows probable cause [to believe] that she participated in a joint criminal enterprise." Pet. App. 37a-38a.[6]

4. On February 28, 1985, a distinguished panel of the United States Court of Appeals for the Second Circuit,[7] in a

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[6] The District Court also opined that "the indictment against Karel itself appears to answer the argument" because that indictment avers that one of the overt acts was committed by Hana, thus evidencing probable cause to believe that she was a co-conspirator, because "an 'overt act' is one committed by a co-conspirator, not by an innocent person." Pet. App. 37a. Notwithstanding its blithe citation by the government (Br. 6 [illegible]), this dictum of the District Court is simply incorrect. In fact, the indictment is carefully drafted to *avoid* describing Mrs. Koecher as a co-conspirator. She is not named as such, and the indictment's wording tends to suggest that she was not. The only reference to Mrs. Koecher is an allegation that Karel Koecher gave her "a package that *concealed* a classified document," and that she in turn, acting "pursuant to defendant KAREL F. KOECHER's instructions," delivered "the package" to a foreign agent. C.A. App. 92 (emphasis added). Since the overt act referred to by the District Court is therefore attributable to Mr. Koecher, 18 U.S.C. § 2(b), it could form the basis for his indictment and conviction *without* either the grand jury or a trial jury being required to find, or any evidence having to be introduced, that Mrs. Koecher was a knowing participant in the conspiracy.

[7] The panel consisted of Judges Henry J. Friendly, Ellsworth A. Van Graafeiland, and Ralph K. Winter.

thorough opinion by Judge Henry Friendly, unanimously reversed that judgment, holding that there was no such exception to the marital privilege as the government contended for. *In re Grand Jury Subpoena (Koecher)*, 755 F.2d 1022 (2d Cir. 1985) (reprinted at Pet. App. 1a-15a). After carefully considering and rejecting various arguments put forward by the government in support of the purported exception, the court concluded that the exception "could create exactly the negative impact on the marriage that the privilege was designed to avoid." Pet. App. 13a.

Judge Friendly began by noting that this Court's decision in *Trammel* v. *United States*, *supra*, has "some negative implications as regards the joint participant exception." Pet. App. 10a. Recalling that the Tenth Circuit in *Trammel* had invoked that purported exception to permit Mrs. Trammel to testify, but that this Court had affirmed on a different ground without so much as mentioning the joint participant rationale, Judge Friendly concluded:

> If the Supreme Court looked on the exception with favor, it is somewhat peculiar that it should not have decided the case on that ground rather than . . . confining the privilege to the witness-spouse, thereby requiring a partial overruling of a decision little more than twenty years old. Also one would have expected the Court at least to have indicated that the exception might still make the privilege unavailable even when the witness-spouse asserted it.

Id.

The court below did not, however, rest its opinion on extrapolation from this Court's views in *Trammel*. Rather, Judge Friendly proceeded to examine in turn each of the government's arguments for creating an exception, exposing the flaws in each. First, the court rejected the claim that applying the marital privilege in "joint participant" situations would facilitate conspiratorial activities. Since, under this Court's decision in *Trammel*, a defendant cannot prevent his spouse from voluntarily testifying against him, a "person desiring to enlist the aid of his spouse as an accomplice cannot now be sure that he is not creating another potential witness; he takes the risk that the spouse may choose to testify." *Id.* at 10a-11a. The court then rejected the claim that marital harmony was a less valuable objective when the partners had committed a crime: "We are also unable to accept the proposition that a marriage cannot be a devoted one because at some time the partners have decided to engage in a criminal activity." *Id.* at 11a.

The court next turned to the government's effort to rely on cases adopting exceptions to confidential communications privileges for communications in furtherance of a crime or fraud. These cases were "rather easily distinguished." *Id.* The attorney-client relationship, "valuable as it is, is hardly of the same social importance as that of husband and wife." *Id.* And the marital confidential communications privilege has a much narrower rationale than the marital testimonial privilege. *Id.* at 13a. It is therefore readily distinguishable, as those courts that have created the exceptions, as well as those that have rejected them, have agreed. *Id.* at 12a-13a.

Finally, the court noted one additional "factor inclining us to reject a joint participation exception to the spousal privilege"—"the difficulty often encountered in establishing the predicate without invading the privilege." *Id.* at 13a-14a. Although the court had earlier held that its disposition of the case made it unnecessary to rule on Mrs. Koecher's contention "that the Government has failed to establish a factual basis for the exception if one exists," *id.* at 8a, the court clearly was unimpressed with the quality of the government's showing, citing this case as a "good example" of the difficulty of establishing joint participation, noting that the government had made no criminal charge against Mrs. Koecher, and finding it at best a "reasonable inference . . . that Hana was aware of what Karel was doing." *Id.* at 14a.

Emphasizing that the "existence [of the marital privilege] since the early days of the common law and the importance of the interests which [it] serves" made it reluctant to create exceptions, the Court of Appeals reversed the adjudication of contempt.[8] The government's petition for rehearing and rehearing *en banc* was denied without dissent on April 11, 1985. Pet. App. 63a-64a.

SUMMARY OF ARGUMENT

In determining questions of privilege, this Court has been instructed by Congress to apply "the principles of the common law, as they may be interpreted . . . in the light of reason and experience." Rule 501, Fed. R. Evid. The principles of the common law, confirmed by the "reason and experience" of the English and American people, require rejection of the erosion of the marital privilege demanded by the government in this case.

A. For more than 400 years, it has been a fundamental principle of the common law that a person cannot be compelled to testify against his or her spouse in a criminal case. This basic rule remains the law in the United States, having been reaffirmed by this Court three times in the past quarter-century. Most recently, in *Trammel* v. *United States*, 445 U.S. 40 (1980), the Court modernized the privilege by permitting a willing wife to testify voluntarily against her defendant husband, while continuing to insist that the government could not compel a witness to betray the person to whom he or she had pledged lifetime loyalty. The Chief Justice's opinion for the Court emphasized that, in view of the long history and constitutional significance of the privilege, "caution" and respect for tradition should guide the Court in interpreting the privilege. *Id.* at 48.

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[8] Because the court stayed its order pending the government's petition for certiorari, *id.* at 14a-15a, Mrs. Koecher remained incarcerated on the contempt charge until March 21, 1985, when she was released on bail.

This longstanding tradition of respect for the privacy and intimacy of marriage is based on two equally compelling rationales. First, society's vital interest in preserving the harmony and stability of marriages, "not only for the benefit of husband, wife and children, but for the benefit of the public as well" compels recognition of the privilege, for adverse testimony in a criminal case would be "likely to destroy almost any marriage." *Hawkins* v. *United States*, 358 U.S. 74, 77-78 (1958). Second, "the natural repugnance in every fairminded person to compelling a wife or husband to be the means of the other's condemnation," 8 Wigmore, *Evidence* § 2228 at 217, reflects a basic moral judgment that compelling such a betrayal is simply wrong. The fundamental human right to the comforts of marriage, a right "older than the Bill of Rights," requires governmental respect for the sacred unity and "bilateral loyalty" of marriage. *Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1966).

Recent developments in both law and society have increased rather than diminished the importance of these essential values. The social importance of the family in an age of increasing divorce, illegitimacy, and interpersonal isolation requires renewed protection. And this Court has responded by restating ever more emphatically the constitutional dimension of the traditional Anglo-American commitment to the freedom of the marital unit from governmental invasion or disruption. *Griswold* v. *Connecticut*, *supra*; *Loving* v. *Virginia*, 388 U.S. 1 (1967) *Zablocki* v. *Redhail*, 434 U.S. 374 (1978).

Perhaps as a result of these developments, recent academic, judicial, and legislative opinion, both in this country and in Great Britain, has supported reaffirmation of the privilege and the values it represents. Not only this Court, but the vast majority of American jurisdictions, have retained the privilege, all without providing for any "joint participant" exception. The British Parliament just last year codified and strengthened the traditional rule, also without including any such exception. Academic commentary in recent years too has universally favored retention, and even expansion, of the privilege.

B. Neither reason nor experience supports the government's claim that an exception to the privilege should be created where the government alleges that spouses were joint participants in crime.

Throughout the 400-year history of the privilege, no jurisdiction has ever adopted, either by legislation or by judicial decision, the rule for which the government contends. Nor has any commentator ever written in favor of it. This long experience itself counsels against the government's claim that cases of "joint participation" stand on a radically different footing from all other marital relationships.

Reason readily explains this universal verdict of experience. The policies that support the marital privilege apply just as strongly where the government contends the spouses were jointly implicated in a criminal act. The devastation worked by destroying a marriage is equally great in such situations, and the human right to continued love and loyalty for one's spouse is not forfeited even by conviction—let alone by casual accusation of criminal involvement.

Nor is the proposed exception required by any law enforcement necessity. The "joint participant" exception does not single out cases where the importance of the spouse's testimony is made more compelling by either the seriousness of the crime or the necessity of the testimony. The government's proposal would allow a spouse to be compelled to betray her marriage partner to supplement already-overwhelming proof of a trivial crime—provided only that a sketchy showing of her involvement could be made—but would allow the privilege to be invoked by an uninvolved spouse who could provide vital testimony about a heinous crime. After *Trammel*, moreover, it can no longer be contended that the privilege in its present form encourages criminal conspiracies by permitting a person to recruit his spouse for a criminal venture, secure that he can prevent her from ever testifying against him.

Experience confirms that little evidentiary benefit can be expected from adopting the government's proposal. A true "joint participant," willing to risk conviction for a serious crime and reject the government's proffer of immunity, whose loyalty to a spouse is reinforced by commitment to a partner in crime, is hardly likely to yield valuable and reliable evidence under threat of contempt. In fact, the government cites not a single case from the two circuits that have adopted its proposed rule in which testimony was in fact elicited—still less any reason to believe that criminal conspiracies are less prevalent in those circuits.

Finally, the government's attempt to analogize to the "furtherance of crime" exception to the attorney-client or other confidential communications privileges, *Clark* v. *United States*, 289 U.S. 1 (1933), is unavailing. Those privileges have different rationales than the marital testimonial privilege, and the "crime or fraud" exception to those privileges operates differently, and is supported by different rationales, than the "joint participant" exception claimed here. Because it is rooted in spouses' close identification with and commitment to each other, the marital privilege is much more closely analogous to the privilege against self-incrimination, which of course contains no exception for those who have committed crimes.

C. This very case exemplifies a further problem with the government's proposed rule, for the government's purported "showing" of joint participation consists entirely of hearsay statements reportedly made by Mrs. Koecher's husband during a lengthy and possibly tainted interrogation. As the court below recognized, the difficulty of determining the predicate for the proposed exception without invading the privilege itself, or relying on mere suspicions arising from the closeness of the marriage, is a further reason for rejecting the privilege. In any event, the absence of a clear showing of joint participation in this case requires affirmance of the judgment even if a "joint participant" exception were appropriate in some circumstances.

ARGUMENT

THE GOVERNMENT HAS DEMONSTRATED NO BASIS IN "REASON AND EXPERIENCE" FOR THIS COURT TO CREATE AN ILL-ADVISED NEW EXCEPTION TO THE LONGSTANDING AND CONSTITUTIONALLY-BASED MARITAL PRIVILEGE.

In this case, the government invites the Court to create a new exception to the marital testimonial privilege, an ancient and still-vital aspect of the constitutionally-protected—but nevertheless ever fragile—institution of marriage. Congress has instructed this Court, in determining questions of evidentiary privilege, to follow "the principles of the common law, as they may be interpreted . . . in the light of reason and experience." Rule 501, Fed. R. Evid. Since the common law plainly has never provided for any such exception as the government seeks, the question presented by this case is simply whether "reason and experience," as developed in the five years since this Court's most recent reaffirmation of the marital privilege in 1980, require opening a loophole in a protection of the traditional family that has been a basic component of the common law for some 400 years. A proper examination of the demands of reason and experience in this area must begin with the fundamental values that have been served by the marital privilege over the many years that it has been a part of Anglo-American law.

A. The Marital Privilege, Based on a Long History of Respect For Marital Intimacy, Continues to Serve Important and Constitutionally Significant Purposes in Support of the Institution of the Family.

For more than 400 years, it has been a fundamental postulate of the common law that a husband or wife may not be compelled to testify against his or her marriage partner.[9] Wigmore traces the recognition of the privilege to the year 1580, and the principle was well established by the time of the publication of Coke's commentaries in 1628.[10]

Nor has the principle atrophied with time. This Court has reaffirmed its commitment to the marital privilege three times in recent years. First, in *Hawkins* v. *United States*, 358 U.S. 74 (1958), the Court unanimously reaffirmed the importance of the principles underlying the marital testimonial privilege. Then, in 1972, in promulgating the Federal Rules of Evidence, the Court, again without dissent,[11] recommended that the marital testimonial privilege be retained. *See* Proposed Federal Rule of Evidence 505, 56 F.R.D. 183, 244-47 (1972). Finally, in *Trammel* v. *United States*, 445 U.S. 40 (1980), while the Court correctly brought the ancient privilege into line with its modern rationale by vesting the privilege in the witness-spouse rather than in the defendant-spouse, the Court—again unanimously—adhered to the view that a spouse may not be compelled to testify against his or her marital partner involuntarily.

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[9] This privilege, commonly referred to as the "marital testimonial privilege" or the "privilege against anti-marital facts," is separate from the more recently-developed privilege protecting confidential marital communications. The *communications* privilege protects from disclosure any communication made in confidence by one spouse to another during the marriage. *See Blau* v. *United States*, 340 U.S. 332 (1951); *Wolfle* v. *United States*, 291 U.S. 7 (1934). The *testimonial* privilege more fundamentally protects existing marriages by permitting a person to refuse to testify against his or her spouse. The two privileges are separate and distinct. *Trammel* v. *United States*, *supra*, 445 U.S. at 45 & n.5. Because the government has not yet sought to question Mrs. Koecher concerning confidential communications with her husband, no issue regarding the communications privilege is before this Court.

[10] 8 Wigmore, *Evidence* § 2227 (McNaughton rev. 1961); *Trammel* v. *United States*, 445 U.S. 40, 43-44 (1980). *See Bent* v. *Allot*, 21 Eng. Rep. 50 (Ch. 1580); Coke, *A Commentary upon Littleton* § 6b (1628).

[11] Justice Douglas dissented in principle from the promulgation of rules of evidence. 56 F.R.D. at 185-86. Neither he nor any other Member of the Court expressed any disagreement with the substance of the proposed rule on marital privilege.

From at least the time of Shakespeare, then, to the present, in both England and America, the law has sheltered the marital unit against the disruption that would result from forcing a spouse to act to the detriment of the person to whom he has most intimately linked his life.

Ironically, the very longevity of the privilege, which ought to be taken as demonstrating its value and importance, has in effect been used by the government to denigrate it. Br. 25-26. A legal doctrine so closely associated with the institution of marriage will of course be defended, articulated and enforced in every age in ways that comport with that era's understanding of the nature of the marital relationship. Accordingly, the marital privilege has at times been defended in terms associated with outdated theories of the meaning and nature of marriage. At one time, for example, the privilege was thought by some to derive from the notion that a wife's very being is subsumed in that of her husband's, so that any disqualification or privilege that prevented him from testifying or privileged him not to testify, should apply equally to disqualify or privilege his wife. *See* 8 Wigmore, *Evidence* § 2227 (McNaughton rev. 1961).[12]

But if some of the arguments that have been advanced in favor of the privilege in the course of its long history have come to appear dated and even offensive, the privilege itself is no mere artifact from a benighted past era. Today, the privilege applies equally to protect both husbands and wives; it protects today's more egalitarian conception of marriage as effectively as it once defended an earlier style of matrimony. Stripped of outdated rhetoric, the basic policies underlying the privilege not only remain important and valid, but have taken on renewed social importance and legal vitality in our own day. What some scholars of a past generation viewed as an "anachronism," 8 Wigmore, *supra*, § 2228 at 217, has won renewed acceptance as a necessary protection of fundamental values.[13]

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[12] It should be noted that this view may actually distort the history of the marital privilege. The privilege apparently developed separately from the rule of incompetency, and had a separate rationale. Only the disqualification rule, which prevented a wife from testifying even on her husband's behalf, was based on the "mystical" views derided by Wigmore and McCormick, while the privilege proper was supported from the very beginning by the same policy against creating marital discord that this Court cited as its basis in *Trammel*. *See* Lempert, *A Right To Every Woman's Evidence*, 66 Iowa L. Rev. 725, 726-28 & nn. 6-10 (1981); Note, *The Husband-Wife Privileges of Testimonial Non-Disclosure*, 56 Nw.U.L.Rev. 208, 209-10 (1961). As Professor Lempert points out, the "argument from mystical oneness" rarely surfaces in early judicial opinions concerning the privilege, and may owe its "prominence in the debate" to opponents of the privilege who find it "such a convenient whipping boy." Lempert, *supra*, 66 Iowa L.Rev. at 728 n.10.

As Judge Friendly's opinion below correctly described them, the basic foundations of the marital privilege are

> "its perceived role in fostering the harmony and sanctity of the marriage relationship," *Trammel*, 445 U.S. at 44, *see also id.* at 53, and the "*natural repugnance* in every fairminded person to compelling a wife or husband to be the means of the other's condemnation, and to compelling the culprit to the humiliation of being condemned by the words of his intimate life partner," 8 Wigmore § 2228 at 217 (emphasis in original), forced from her by governmental compulsion.

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Both of these policies remain urgent today, and they continue to support the existence of the marital testimonial privilege. The family continues to be the basic building block of civilized society, and marriage continues to be the basis for the traditional family. Respect for and support of the institution of marriage is not only governmental policy, but a constitutional command. *See Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Zablocki* v. *Redhail*, 434 U.S. 374 (1978). Yet today that essential institution is threatened as never before by economic pressure, social discord, and the failure of the

institution of marriage itself as traditionally organized to recognize the legitimate aspirations and needs of women.

The marital privilege is a vital attribute of this fragile institution. As this Court unanimously ruled in *Hawkins* v. *United States, supra*:

> The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife, and children, but for the benefit of the public as well. Such a belief has never been unreasonable and is not now.

358 U.S. at 77. The essence of marriage is mutual loyalty and support. Governmental intrusion into marriage for the purpose of using one spouse against the other must necessarily breed resentment and hostility between the parties that would totally disrupt the very basis of the relationship. As this Court wisely observed, "Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage." *Hawkins* v. *United States, supra*, 358 U.S. at 78.

The spectacle of the government deliberately creating such marital discord would be inherently destructive to family values that the government ought to be striving to support. The bonds that unite families are the prototype for the bonds of loyalty that hold the wider society together; the ability to identify even one other person as more important than one's own well-being is a necessary first step to the larger sense of obligation and altruism that make a complex social order possible. As this Court long ago recognized, marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard* v. *Hill*, 125 U.S. 190, 211 (1888). For the government to pressure people to betray their deepest obligations of loyalty in order to escape punishment for contempt is not only to deal a blow to the family and to marriage, but to teach a lesson that can only breed disrespect for law in a larger sense. As Professor Charles

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[13] Contrary to the government's suggestion (Br. 25-26), the marital privilege is broadly supported by academic opinion today. *See* below at p. 22 & n.20.

Black pointed out, in criticizing efforts to weaken the privilege and obtain one spouse's testimony against the other,

> It ought to be enough to say of such a rule that it could easily—even often—force any decent person—anybody any of us would want to associate with—either to lie or to go to jail. No rule can be good . . . that compels the decent and honorable to evade or to disobey it.

Black, *The Marital and Physician Privileges—A Reprint of a Letter to a Congressman*, 1975 Duke L.J. 45, 48 (1975). Abandoning or undermining the marital privilege, then, would weaken rather than strengthen society's commitment to the basic institution on which society rests.

Perhaps a more fundamental justification for the marital privilege, however, is what Wigmore referred to as the "natural repugnance" in "every fairminded person" at the spectacle of requiring a person to cooperate in the prosecution of the person to whom she has joined her life. Although Wigmore himself insensitively dismissed this fundamental human reaction as "sentiment," 8 Wigmore, *supra*, § 2228 at 217, he in fact had pointed out a critical reason for the privilege. Unlike such other privileges as the attorney-client or psychotherapist-patient, which create privileges in particular professions principally for utilitarian reasons, in order to foster the provision of professional services deemed useful by society, the marital privilege at its heart is founded on the basic moral conclusion that it is offensive to the concept of human dignity embedded in our constitutional tradition, and indeed in the English common law, to force one spouse to contribute to the destruction of the other. In this, the marital privilege more closely resembles the constitutional privilege against self-incrimination than other evidentiary privileges, for it rests on the basic perception that to be forced to testify against one's spouse is morally equivalent to being forced to testify against oneself.[14]

This second aspect of the rationale of the privilege is of crucial importance, and the failure to acknowledge it is a critical and disturbing flaw in the government's argument. Thus, the government insists that the privilege exists solely to advance a society's immediate collective interests, as if the only interest in maintaining marital harmony were the *government's* interest in that objective. Br. at 16.[15] But if this Court's constitutional decisions regarding family privacy stand for anything, they demonstrate that the right of self-determination in these most intimate of human relationships must prevail even when it conflicts with particular social policies. *See Griswold* v. *Connecticut, supra*; *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977); *Zablocki* v. *Redhail, supra*. *See also Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). The right to marital privacy, and the privilege against governmental disruption of marital unity entailed by that right, are not mere instruments of social policy. Rather, they are fundamental aspects of the human right of intimate family association recognized in *Griswold*. As even Wigmore was compelled to admit, the privilege is based not merely on instrumental concerns to foster social goals, but on our "*natural repugnance*" at a policy that would further even the important goal of truthfinding at the expense of basic human decency.

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[14] In this respect, the much-derided notion that husband and wife are two in one flesh in fact contains an important moral truth. While of course spouses are not literally joined in a mystical union, and retain legally distinct identities, the metaphor reminds us that in our tradition the very concept of marriage is that husband and wife commit themselves to each other in so fundamental a way that the other becomes as important as oneself, to the point that his or her interests become identified with one's own. That this idea has at times in the past been applied in a one-sided and sexist way to rationalize denial of women's separate identities does not destroy its validity.

[15] Indeed, the government goes so far as to distort the meaning of this Court's pronouncement in *Hawkins* v. *United States, supra*, that the privilege seeks to "foster family peace, *not only* for the benefit of husband, wife, and children, but for the benefit of the public *as well*," 358 U.S. at 77 (emphasis added), by suggesting, contrary to the clear language of the Court, that the public benefits from family relationships are the principal, rather than merely an additional, reason for the privilege. *See* Br. at 16.

The government's inability to argue in any but the most crudely utilitarian terms is stunningly epitomized in its refusal even to acknowledge as legitimate this most important justification for the marital privilege. Br. 20-21 n.15. Citing Wigmore, the government professes to regard the universal repugnance for forcing one spouse to betray another through governmental compulsion as a mere "sentiment", to be disregarded because it "does not posit any direct and practical [evil] consequence." *Id.* If the government truly does not apprehend the fundamental nature of the human need for intimate association, for the caring and commitment that are the essence of the marital relationship, and for the necessity of close identification with another person for the fulfillment of a human identity, or does not see the destruction of relationships that provide these essential values as a sufficiently "practical" evil consequence, it is difficult to know how to begin to instruct it.[16]

Fortunately, there is no need to instruct this Court about the critical importance of the marital relation to human fulfillment, and the commitment of our tradition to the privacy of that relation against governmental intrusion. For this Court's cases demonstrate that these values remain as strongly recognized in our law today as they have ever been. If belief in "the sanctity of the family," *Moore* v. *City of East Cleveland*, *supra*, 431 U.S. at 503, or respect for "the emotional attachments that derive from the intimacy of daily association" in marriage, *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 844 (1977), are mere "sentiments," they are sentiments that have animated this Court's recent decisions emphasizing the constitutional protection accorded to the family.

This Court's insistence on the constitutional importance of the marital relation has dramatically increased in recent years. While this Court long ago correctly recognized marriage as "the most important relation in life," *Maynard* v. *Hill*, *supra*, 125 U.S. at 205, it is only in relatively recent times that it has acknowledged the constitutionally-protected status of marriage as a fundamental right that can only be restricted by the state under the most compelling necessity. Thus, in *Griswold* v. *Connecticut*, *supra*, decided in 1965, the Court noted not only that the right to security of the marital unit against governmental invasion is protected by the Constitution, but that this fundamental right runs deeper even than that:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

381 U.S. at 486. Shortly thereafter, in *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967), the Court once again emphasized that "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men," and that marriage is "one of the 'basic civil rights of man,' fundamental to our very existence and survival." *See also Zablocki* v. *Redhail*, *supra*, 434 U.S. at 383-85; *Smith* v. *Organization of Foster Families*, *supra*, 431 U.S. at 842-44; *Carey* v. *Population Services International*, 431 U.S. 678, 684-85 (1977); *Moore* v. *City of East Cleveland*, *supra*, 431 U.S. at 503-05; *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 639-40 (1974).

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[16] As Professor Kenneth Karst has noted, to attempt to isolate and describe the benefits of the marital relation is "roughly comparable to . . . pursuing literally the inquiry, 'How do I love thee? Let me count the ways.' The joys and beauties . . . of intimate association are not really reducible to entries on a shopping list." Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 630 (1980). Ironically, if the government seeks enlightenment on the general importance of nonutilitarian values, or the specific importance of the kinds of bonds the government derides in its brief, there is no better place for it to begin than with the academic writings of the Solicitor General. *See, e.g.*, Fried, *The Anatomy of Values* 207-36 (1970); Fried, *Privacy*, 77 Yale L.J. 475 (1968); Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 Yale L.J. 1060, 1066-71 (1976).

Only two terms ago, this Court once again eloquently reaffirmed its commitment to the principle that, "because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Roberts* v. *United States Jaycees*, 104 S.Ct. 3244, 3250 (1984). The Court went on to point out that it has long held that "personal bonds" such as those of marriage and the family

> have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State. [Citations omitted.] Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.

Id. In other words, this Court well knows, and has long insisted, that the marital unit is constitutionally protected against governmental disruption because the institution of marriage is fundamental *both* to the nature of our social and political institutions *and* to the human right of all persons to pursue their own fulfillment.

There can be no question, moreover, that the marital testimonial privilege is a critical part of the legal effort to "[p]rotect [marital] relationships from unwarranted state interference." *Id.* There is little the state could do that would strike so forcibly and directly against the "bilateral loyalty" cited by the *Griswold* Court as essential to marriage as compelling one spouse to denounce the other to criminal prosecution. The potency of this sort of betrayal as a destroyer of loving relationships, and indeed of human dignity itself, was well understood by the totalitarian torturers of Orwell's *1984*, in which the compulsion of such a betrayal is depicted as the ultimate horror perpetrated by the ultimate dictatorial state.[17] But we need not look to literature for recognition of that proposition. This Court acknowledged its truth both in *Hawkins*—where, as noted above, it pointed out that adverse testimony in a criminal case "would . . . be likely to destroy almost any marriage," 358 U.S. at 78—and in *Trammel*, where the Court pointed out that a wife's voluntary decision to testify against her husband persuasively demonstrated that there was no marital harmony left to preserve. 445 U.S. at 52. The point is the same in both cases: to permit the government to require testimony against a spouse would authorize the state to intrude directly into the most sacred and constitutionally protected relationships—not merely, as in *Griswold*, to regulate its incidents, but to destroy it entirely.[18]

Perhaps in response to these social and legal developments of recent years, which have significantly increased our sensitivity to the importance of the marital union, academic discussion of the marital privilege has veered strongly in the past quarter century toward support for an extensive marital privilege. The government, relying principally on Wigmore's lack of enthusiasm for the privilege, implies that the privilege has been treated by academic commentators as an outdated and disfavored relic of medieval attitudes. Br. at 25-26. In fact, nothing could be further from the truth; it is the government's view that is outdated.[19] Recent scholarly treatment of the privilege is overwhelmingly favorable.[20] Indeed, the most serious criticism of the scope of the privilege has come from those who urge its expansion to protect the parent-child and other intimate associations from governmental investigative zeal, and not from those who find it unnecessary or counterproductive.[21]

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[17] What the torturers most wanted from the protagonist of the novel, and what ultimately broke down his humanity, was the betrayal of the woman to whom he had pledged his loyalty. Orwell, *1984* 232-41 (1948; Signet ed. 1961). As the case of Andrei Sakharov and Yelena Bonner reminds us, the disrespect of totalitarian regimes for marital integrity is no mere literary conceit.

[18] The government's bracketing of this case with *Califano* v. *Jobst*, 434 U.S. 47 (1977), as examples of the burdens that the state can legitimately impose on the marital relationship is yet another example of the government's remarkably obtuse view of marriage. Forcing one spouse to betray another by testifying against him or her in a criminal trial not only, in practical terms, is "likely to destroy [the] marriage"—it also represents the very negation of the "bilateral loyalty" that is the essence of marriage. To compare this with a provision of a statutory benefit program that makes the availability of a few dollars of social security contingent on marital status (Br. 22 n.16) is bizarre.

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[19] The government cites four sources as critical of the privilege. Wigmore's treatise was first published in 1904; McCormick's in 1954. The Model Code of Evidence was published in 1942 and the Uniform Rules of Evidence in 1953. Unlike the recent commentators cited in the next note, none of these sources had the benefit of this Court's opinions in *Hawkins* and *Trammel*, or in the constitutional family privacy cases stemming from *Griswold*.

[20] *See, e.g.*, Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 Duke L.J. 631 (1984); Lempert, *supra*, 66 Iowa L.Rev. 725 (1981); Black *supra*, 1975 Duke L.J. 45; Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 Calif. L.Rev. 1353, 1385-86 (1973); Note, *Developments in the Law—Privileged Communications*, 98 Harv. L.Rev. 1450, 1563-75, 1577-92 (1985); Note, *Partners in Crime: An Examination of the Privilege Against Adverse Spousal Testimony*, 22 J.Fam.L. 713 (1984); Note, *The Spousal Testimonial Privilege After Trammel v. United States*, 58 Den. L.J. 357 (1981); Note, *The Husband-Wife Testimonial Privilege in the Federal Courts*, 59 B.U.L.Rev. 894 (1979); Comment, *Husband-Wife Evidentiary Privileges: The Power of the Federal Courts to Seek a Rational Solution*, 17 St.L.U.L.J. 107 (1972); Comment, *Federal Rules of Evidence and the Law of Privileges*, 15 Wayne L.Rev. 1287, 1336-37 (1969); Note, *supra*, 56 Nw.U. L.Rev. 208, 230-34. While in most cases supporting the modernization of the privilege effected by this Court in *Trammel*, these commentators unanimously accept the premises underlying the privilege, and support its retention in its present form. Indeed, we have not found a single academic critic writing after this Court's *Griswold* decision who shares the negative view of the privilege propounded by the earlier writers cited by the government, or who urges its abolition, limitation or contraction.

[21] *See, e.g.*, Note, *Developments in the Law—Privileged Comunications*, *supra*, 98 Harv.L.Rev. at 1588-92; Levinson, *supra*, 1984 Duke L.J. 631. These claims for broader testimonial privileges are not presented by this case. Whatever the ultimate merits of such argu-

Academic and legislative opinion in Great Britain has also favored retention of the marital privilege in its present form, without erosion. As in this country, the traditional rule in Great Britain was that an accused's spouse "is not generally a competent or compellable prosecution witness." Heydon, *Cases and Materials on Evidence* 384 (1975). *See also* Zander, *Cases and Materials on the English Legal System* 328, 355-56 (4th ed. 1984). In 1972, the prestigious British Criminal Law Revision Committee, after a thorough study of the policies relevant to the question, recommended (1) that willing spouses be made competent to testify for the prosecution in all cases, and (2) that the prohibition against *compelling* testimony by one spouse against another be retained, and, indeed, strengthened. Criminal Law Revision Committee, Eleventh Report of the Criminal Law Revision Committee, Evidence (General) ¶¶ 147-56 (1972).[22] These recommendations were enacted by Parliament in Section 80 of the Police and Criminal Evidence Act of 1984. *See generally* Zander, *The Police and Criminal Evidence Act of 1984* 117-19 (1985). Like this Court in *Trammel*, then, the British have modernized the privilege by permitting *voluntary* spousal testimony, but have retained the prohibition against *compelling* testimony by an unwilling spouse. Notably, neither the Law Revision Committee nor Parliament proposed anything resembling the "joint participant" exception urged by the government here.

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ments, this Court in the past has been able to distinguish between traditional family units and other sorts of associations. *Compare Moore* v. *City of East Cleveland*, *supra*, with *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974).

[22] The Committee specifically urged repeal of a number of minor exceptions that had arguably crept into the law in the late 19th century. *Id.* at ¶ 152. *See also* Heydon, *supra*, at 384-85. The only exception recommended was in cases of violence or sexual offenses against the witness spouse himself and against minors.

In summary, then, the marital privilege has deep roots, not only in our history but in our fundamental values. Not only is the privilege the result of over 400 years of "reason and experience," in this country and in Great Britain, but it retains its importance as a protection for individual and marital privacy to the present day. Contrary to the impression that the government seeks to create, the marital testimonial privilege is not an antiquated doctrine, carried forward from an unenlightened prior age, with little scholarly support and an eroding acceptance in the courts and legislatures. Rather, it is a rule that has earned growing scholarly respect and repeated reaffirmations by this Court, as well as by other British and American authorities, and whose basic premises are if anything more important today than ever. This Court's recent cases emphasizing the constitutional importance of the traditional family, and "the stresses of modern society [that] make more attractive than ever before the prospect of a safe harbor of intimacy" free of the fear of governmental intrusion, 2 Weinstein & Berger, *Weinstein's Evidence* ¶ 505[02] at 505-12 (1982), both demonstrate the continuing validity of the values underlying the common law privilege.

B. The Suggested "Joint Participant" Exception to the Marital Privilege is Unprecedented and Illogical, and Would Seriously Undercut the Policies Served by the Privilege Without Significant Benefits to Law Enforcement.

The Chief Justice in *Trammel* pointedly expressed the attitude that should guide the Court in interpreting the common law as it applies to a venerable privilege that lies close to the heart of constitutional principles: "[T]he long history of the privilege suggests that it ought not to be casually cast aside. That the privilege is one affecting marriage, home, and family relationships—already subject to much erosion in our day—also counsels caution." 445 U.S. at 48. An appropriately "cautio[us]" response to the instant case would not "casually cast aside" the clear historical understanding of the marital privilege to accept the government's claim that the policies that

ordinarily require respect for the marital relationship do not apply when the government alleges that the spouses were "joint participants" in crime. Neither reason nor experience justifies the government's proposed innovation.

1. *No Jurisdiction Has Ever Adopted the Exception the Government Seeks.*

In assessing whether "reason and experience" require the creation of the exception demanded by the government, we must start with one striking fact: in all of the 400-year history of the marital privilege, the experience of English and American courts and law enforcement officers has never been thought to require such an exception; indeed, such an exception, so far as we can discover, was never even suggested by anyone until 1974. The exception urged by the government cannot be claimed to be part of the common law of evidence; no case from any English court, or from the highest court of any American or other common law jurisdiction, can be cited in support of it.

The implications of this complete absence of authority are compelling, in light of Congress' requirement that this Court interpret the common law in light of "reason and experience." The marital privilege has been a functioning part of Anglo-American law for at least four centuries—virtually the entire history of the modern common law. During that time, its validity and contours have been subject to continued debate and commentary in courts, in legislatures, and among legal scholars. In the course of that extended debate, numerous exceptions and qualifications have been proposed or adopted, as courts and legislatures have decided whether the privilege applies after termination of the marriage; to events that occurred before the marriage; to crimes against the spouse or other family members; in civil as well as criminal cases; when asserted by the defendant spouse to prevent voluntary testimony by the witness-spouse; and so on until the standard treatises require considerable space to elaborate a full statement of the contours of the privilege.[23] In the course of that debate, some have even argued that the privilege should be eliminated—a position rejected by this Court, though adopted by some states through legislation. *See Trammel* v. *United States*, *supra*, 445 U.S. at 48-49 n.9.[24]

Strikingly, *none* of these judicial, legislative, or academic reassessments of the privilege have concluded that a "joint participant" exception should be created. Neither the British codification and modernization of the privilege in 1984, nor this Court's 1972 proposed rules of evidence included the

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[23] *See*, *e.g.*, 8 Wigmore, *supra* 210-65; 2 Weinstein & Berger, *supra*, 501-1—505-32.

[24] The government suggests that a "trend" towards abolition of the privilege "has continued in the years since *Trammel* was decided," citing two states that have rescinded rules of privilege since 1980. Br. 25-26. The government neglects to note three crucial facts:

(1) Two other states that have recodified their rules of evidence since 1980 have expressly retained the privilege, as have the Military Rules of Evidence. *See* Hawaii Rules of Evidence, Rule 505 (1980); Oregon Evidence Code, Rule 505 (1981); Military Rules of Evidence, Rule 504, Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (1980). In addition, as previously discussed, the United Kingdom has codified and strengthened its marital privilege rule. *See* Police and Criminal Evidence Act of 1984, § 80. There is, in other words, no "trend" away from the privilege.

(2) Overall, taking into account the changes cited by the government, and the survey conducted by this Court in *Trammel*, 19 states lack a marital privilege, while 31 states, the District of Columbia, Puerto Rico and the Military Rules of Evidence, as well as the federal courts and Great Britain, have retained it. The marital privilege thus continues to be the clear majority rule.

(3) As further discussed below, *not a single one* of the evidence codes cited above includes the "joint participant" exception sought by the government here.

In short, the "trends" in this area of the law provide no support whatever for the government's position. Indeed, if the trends in academic discussion are taken into account, *see* above at p. 22 & n.20, the movement is clearly away from the further erosion of the privilege.

exception urged by the government in this case; not a single state supreme court has adopted such an exception; not a single state legislature has adopted a rule or statute recognizing the marital testimonial privilege but incorporating a "joint participant" exception; not a single academic commentator has ever proposed the "joint participant" notion as a sensible reform, or has approved it after studying the lower court cases relied upon by the government.[25] Indeed, the striking lack of case law concerning this "exception" in the states and in other common-law jurisdictions suggests that even prosecutors have characteristically understood that no such exception exists, and have been content to live without it. In short, the rule that the government suggests is demanded by "reason and experience" is the law precisely nowhere.

Moreover, even the lower federal courts that have endorsed the government's proposed erosion of the privilege first did so, as the facts of their cases make clear, as an expedient solution to a problem that no longer exists. In both *United States* v. *Trammel*, *supra*, 583 F.2d 1166, and *United States* v. *Van Drunen*, *supra*, 501 F.2d 1393, the courts of appeals were confronted with spouses who were *willing* to testify, but were prevented by their spouse's objection. Bound by this Court's decision in *Hawkins* v. *United States*, *supra*, the courts in those cases had to grope for a basis on which to reach the result this Court later held in *Trammel* was in any event correct: to permit the willing witness spouse to testify. The invention of the "joint participant" exception in these circumstances can hardly be claimed as a development of the law in light of reason and experience; it was rather a development occasioned by a desperate effort to evade a troublesome, and later discarded, formulation of the privilege.[26]

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[25] Indeed, the only academic commentators we have found who have expressly considered a possible "joint participant" exception have done so only to reject it. *See* Note, *supra*, 59 B.U.L.Rev. at 895, 909-12, 919; Note, *supra*, 22 J.Fam.L. at 734.

[26] Moreover, in both Seventh Circuit cases relied on by the government, the "joint participation" exception was unnecessary to the

Notably, when the *Trammel* case came before this Court, the Chief Justice's opinion for an essentially unanimous Court made no reference to the Tenth Circuit's use of this "innovative" expedient, but affirmed its judgment on the quite separate ground that the privilege should reside in the witness spouse and not in the defendant. Significantly, too, nothing in the Chief Justice's opinion contains any suggestion that Mrs. Trammel could have been compelled to testify against her will. The entire opinion proceeds on the premise that she could not; the "joint participant" question was not even reserved. Clearly, this Court in *Trammel* indicated no favorable opinion of the joint participant exception.[27]

2. *The Policies Underlying the Privilege Apply No Less Strongly Where the Government Claims Joint Participation in Crime.*

The total lack of authoritative support for the government's view is easily explained, for the fact is that there is no plausible policy that could justify retaining the marital privilege, but withholding it in the cases covered by the government's proposed exception. As pointed out above, the rationales of the marital privilege fall into two broad categories: the social

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decision for the further reason that in each case, the testimony sought concerned events that had occurred *before* the marriage, and the Court of Appeals relied upon that fact as an alternate basis for its decision. *United States* v. *Clark*, *supra*, 712 F.2d at 302; *United States* v. *Van Drunen*, *supra*, 501 F.2d at 1397.

[27] As Judge Friendly observed in the opinion below, this Court's

> action in *Trammel* has some negative implications as regards the joint participant exception. If the Supreme Court looked on the exception with favor, it is somewhat peculiar that it should not have decided the case on that ground rather than making the much broader [change in the law that it made, thus] partial[ly] overruling . . . a decision little more than twenty years old. Also one would have expected the Court at least to have indicated that the exception might still make the privilege unavailable even when the witness-spouse asserted it.

Pet. App. 10a.

importance of preserving the harmony and sanctity of marriage, and the moral imperative of respecting the need and right of human beings to create intimate relationships. These rationales lose none of their force when the government alleges that both marital partners were involved in criminal activities.[28]

First, the social importance of preserving marriages is not diminished by an allegation of joint involvement in a criminal act. As this Court has held, one spouse's giving adverse testimony about the other in a criminal case would "be likely to destroy almost any marriage." *Hawkins* v. *United States*, *supra*, 359 U.S. at 78. There is no reason to assume that marriages in which the witness-spouse was a participant in the venture would be any less vulnerable to such destruction than those in which the spouse, though possessing information relevant to the prosecution, was innocent of involvement.[29] Nor are the social consequences of this destruction any less in the context of alleged joint participants in crime: the damage to the family structure, the damaging effect on any children of the government's pitting of parents against each other, and the debilitating social effects of the government's encouraging betrayal of fundamental loyalties are equally present whether the marriage partners are innocent or guilty.

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[28] We fully agree with the government that because privileges derogate from the search for truth, they must be strictly construed in light of their purposes. Br. 10. But the converse is also true: where the rationale of a privilege *does* apply, the privilege should not be eroded by talismanic invocation of the preeminent importance of the judicial search for truth. The reminder from a wise judge applies in this context as well as with regard to other privileges:

> Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much. And surely, the general evil of infusing reserve and dissimulation, uneasiness, and suspicion and fear [into vital relationships is] too great a price to pay for truth itself.

Pearse v. *Pearse*, 63 Eng. Rep. 950, 957 (1846), quoted in Note, *supra*, 85 Harv. L. Rev. at 1450.

[29] If anything, one might imagine that the sense of betrayal would be deepened in cases in which the witness-spouse was aware of and participated in the unlawful venture, as compared to cases in which the witness-spouse provides information of a more neutral sort, compatible with the witness-spouse's own innocence and belief in that of the defendant-spouse.

Faced with the obvious fact that forcing a wife to testify against her husband is equally destructive of marital unity, whether or not the government chooses to characterize the spouses as co-participants in crime, the government resorts to the remarkable assertion that society has no interest in preserving the marriage of spouses who have committed a crime, claiming that the sole value of marriage is the transmission of society's values, and that, since the commission of crime is at odds with society's objectives, a marriage in which the partners have committed a crime is *ipso facto* antithetical to society's ends and therefore valueless. Br. 17-18. The government's logic is as false as it is facile.

The government is surely correct that when a husband and wife commit a crime, their criminal behavior violates society's norms. This does not at all mean, however, that their family relationship can be dismissed as an anti-social instrument, "no more beneficial to society than any other criminal conspiracy" (Br. 17), the destruction of which is of no consequence to society. A crime, even a serious and calculated crime, is only a part of a person's life. Having conspired together to evade income taxes or shelter an illegal alien, or even to deal in drugs or commit espionage, does not render a married couple the equivalent of the "Mafia"—an association that exists only for criminal purposes. Commission of a crime does not, as the government dismissively contends, render a person unqualified or disinclined to transmit basic social values to his or her children, to provide love and support to a spouse, or to provide an example of unselfish love and loyalty.

Second, the government's contention that the policies underlying the marital privilege do not apply in "joint participant" situations is critically dependent on its total disregard of the other rationale of the privilege: the "natural repugnance" we

feel at the prospect of invading the unity of the marital relationship to require one spouse to be the instrument of condemnation of the person to whom he or she has sworn unswerving loyalty. Respect for the human dignity of the marriage partners and the sacred intimacy of their relationship is unaffected by the allegation of wrongdoing by the spouses. Certainly, given the right of autonomy in family decisions recognized in *Zablocki*, the government could not routinely treat the existing marriages of convicted criminals as nullities, to be disregarded or overtly disrupted to serve the convenience of the state.[30] Still less is the government entitled to make destructive invasions of marital privacy and intimacy where it merely alleges, as it has done here, on the slimmest grounds, that the spouses were engaged in criminal activity.

Even conviction of crime does not deprive a defendant of his humanity, or alter his basic human need for and right to the intimate support and affection of a marriage partner. Still less does a mere accusation, emanating not even from the grand jury as an official institution of criminal proceedings but from a prosecutor as a tactical device to obtain testimony. There is no reason to suppose that because a husband and wife succumb to the temptation to commit a crime, they are any the less intimately linked to each other's destinies, or that society is therefore entitled to disrupt or devalue the bond that ties them together.

While, as Judge Friendly reminds us, the dignity and loyalty of the marital relationship can exist even where the spouses are accused of the most serious crimes,[31] the government's claim

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[30] Indeed, it is doubtful whether the government could constitutionally prohibit even new marriages by prison inmates serving less than life sentences. *See Bradbury* v. *Wainwright*, 718 F.2d 1538, 1540-42 & nn. 3-4 (11th Cir. 1983); *In re Goalen*, 414 U.S. 1148, 1148-50 (1974) (Stewart, J., dissenting from denial of certiorari). *Cf. Johnson* v. *Rockefeller*, 365 F.Supp. 377 (S.D.N.Y. 1973), *aff'd sub nom. Butler* v. *Wilson*, 415 U.S. 953 (1974).

[31] As Judge Friendly aptly observed for the court below:

> We also are unable to accept the proposition that a marriage cannot be a devoted one simply because at some time the partners decided

here is not limited to such cases. The government asserts the right to turn one spouse against another even to obtain evidence in a tax evasion case, in order to convict a husband by the compelled testimony of a wife who, in the government's opinion, knowingly signed a joint return alleged to be false. The argument that participation in such a crime robs the marriage of its status as a sacred union is impossible to credit.

That the testifying spouse has also sinned, in short, cannot lessen the "natural repugnance in every fairminded person" at the spectacle of the government forcing a person to betray and condemn one to whom he or she has pledged lifelong fidelity. And it cannot be forgotten that in this case, the government seeks to impose these drastic consequences where *neither* spouse has been convicted of *any* crime, and where it has not even formally *charged* Mrs. Koecher with any offense.

3. *No Overriding Law Enforcement Purpose Is Served By the Proposed Exception.*

The exception sought by the government cannot be defended, then, on the ground that the policies underlying the privilege are any less applicable, or any less vital to society, in cases where the government alleges joint participation in crime. It must therefore be defended, if at all, on the ground that compelling governmental necessity, not present in the ordinary marital privilege case, justifies departure from the usual rule, despite the calamitous costs of requiring testimony. The government's principal claim in this regard, that the need for evidence in such cases outweighs the policies underlying the marital privilege, fails for four reasons.

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to engage in criminal activity. This is especially true with respect to political offenses, as witness some celebrated cases in this very court.

Pet. App. 11a. Judge Friendly's apparent reference to the Rosenberg case provides graphic evidence, if a particular case be needed to make the point, that the deepest love and the greatest dignity in the marital relationship can be consistent with conviction even of serious offenses, and can be maintained even in the face of the ultimate penalty. For a moving fictional account of the critical importance and abiding value of family relationships based loosely on that case, *see* E.L. Doctorow's *The Book of Daniel* (1971).

First, the need for evidence from the spouse to enforce the criminal law against dangerous criminals does not distinguish cases covered by the proposed exception from cases to which it does not apply. A spouse's evidence may be equally necessary for conviction where that spouse is uninvolved in the offense. The testimony of a perfectly innocent wife that her husband, accused of murder, was not home on a given night—testimony that the government concedes she could refuse to give—could make the difference between conviction and acquittal as easily as the same testimony given by a spouse alleged to have participated in the criminal venture. Nor does the government's proposed exception distinguish serious cases from trivial ones: since the government's proposed rule applies to shoplifters and petty tax evaders as well as to murderers and drug dealers, the government's proposed rule would permit a wife to be forced to testify against her husband if a sketchy showing could be made to suggest her participation in a petty fraudulent scheme, while allowing invocation of the privilege, no matter how vital the spouse's testimony or how serious the case, provided only that the spouse was not herself culpable. If the need for important evidence were enough to justify overriding the marital relationship, the balance would have to be struck in a very different way from that dictated by the government's suggested rule.

Second, the government greatly exaggerates the benefits to be expected from compelling spouses to incriminate each other, by carelessly assuming that the costs of weakening the marriage must be set against the significant benefits of obtaining truthful testimony. But a realistic assessment of the situation suggests that reliable testimony will rarely be obtained. A person who is ordered to testify against his or her spouse, after all, cannot actually be forced to speak, let alone to speak truthfully. He or she retains the ability to resist or to lie: the "cruel trilemma" of perjury, contempt, or self-incrimination, familiar in the Fifth Amendment context, *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U.S. 52,55 (1964), is equally present here.

The government's claim that important testimony will be obtained by exposing spouses to this trilemma seems willfully naive. If, as Professor Black contends, the prospect of having to incriminate one's spouse would easily "force any decent person—anybody any of us would want to associate with—either to lie or to go to jail," Black, *supra*, 1975 Duke L.J. at 48, the likelihood of obtaining testimony that would genuinely advance the search for truth would be small even if the privilege were abolished altogether. In the sorts of cases hypothesized by the government, moreover, the witness it seeks to compel is simultaneously the spouse of the defendant or target (and thus deeply devoted to his interests), a participant in the crime under investigation (and thus both motivated to avoid disclosure of her misdeeds and, presumably, more willing than the average innocent citizen to evade or defy a judicial command to testify), and unwilling to testify voluntarily (that is, willing to risk prosecution and punishment for her asserted role in the crime rather than betray her spouse in exchange for immunity or leniency). Under these circumstances, the likelihood that an order to testify will in fact result in reliable, accurate testimony, or indeed any testimony at all, seems extremely slim.[32]

In exchange for overriding our societal repugnance for demanding that one spouse betray another, then, what the government really stands to gain is not valuable evidence against wrongdoers, but an opportunity to punish spouses who are marginally involved in crime, or mistakenly thought by the prosecutor to be thus involved—not for the crimes they are

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[32] Indeed, in this very case, Mrs. Koecher informed the District Court "that she would rather die in prison than give any testimony detrimental to her husband," Pet. App. 7a; *see also* C.A. App. 60, and in fact has suffered four months of incarceration already rather than violate her loyalty to her husband.

thought to have committed, but for honoring the moral ideal of marriage that the government seeks to degrade. That is not a trade we should be willing to make.[33]

Third, the available empirical experience confirms what reason suggests—that little valuable evidence will be produced by undermining the privilege. At the outset, it cannot be forgotten that both Great Britain and the United States, as well as every state that has retained the marital privilege, have managed to operate effective law enforcement systems for hundreds of years without the need to adopt, or even seriously to propose, an exception of the sort the government seeks in this case. That fact alone must counsel rejection of the claim that vital law enforcement interests require a departure from our usual principles.

Nor has experience in the two circuits that have adopted the exception demonstrated its supposed value. The government fails to cite a single case from those circuits in which the presence of the exception generated significant, or indeed any, evidence. Despite the command of Congress that modifications in the common law of privilege be justified by "reason and experience," the government's brief is as devoid of experience as it is faulty of reasoning.

The three cases in which the exception was endorsed by courts of appeals demonstrate the dubiousness of the claim that the joint participant exception will produce valuable evidence. Two of them arose before this Court's decision in *Trammel*. *United States* v. *Trammel*, *supra*; *United States* v. *Van Drunen*, *supra*. In both of these, testimony was provided by a *willing* spouse. Such testimony is now admissible in any circuit, and therefore these cases cannot be cited as examples in which valuable testimony was obtained by compelling an unwilling spouse to testify under a "joint participant" rationale.

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[33] Contrary to the government's suggestion, to make this argument is not to argue that privileges should be granted whenever one person would be unwilling to testify against another. (Br. 29 n.24). It is merely to recognize that where a privilege based on compelling policies already exists, and the government claims that an exception should be made in order to obtain crucial evidence, the likelihood that valuable benefits will actually be obtained by violating people's human rights should at the very least be examined realistically rather than naively.

In the only case recognizing the exception in which a spouse *was* ordered to testify over his own, rather than his defendant spouse's, claim of privilege, the witness spouse—like Mrs. Koecher—ultimately refused to testify against his wife and was held in contempt. *United States* v. *Clark*, *supra*. The search for truth (or at least for evidence against Mrs. Clark) was not aided, and the total social gain from this attempted incursion into marital loyalty was a short additional jail term for a witness who had already been convicted and imprisoned for a relatively minor embezzlement.

Nor has experience in the other circuits suggested a demand for such an exception. In over ten years since the Seventh Circuit first resorted to the "joint participant" exception as an expedient to permit testimony by a willing witness, *United States* v. *Van Drunen*, *supra*, only two cases have reached other courts of appeals in which prosecutors have sought to use the argument to compel testimony against one spouse from the other. In both of them, *In re Malfitano*, 633 F.2d 276 (3d Cir. 1980), and the instant case, the courts of appeals rejected the exception.[34] The failure of prosecutors even to raise the issue in the other circuits, or, so far as we have discovered, in any of the states in which the marital privilege is honored, hardly suggests a widespread belief, even among prosecutors, that important social benefits could be obtained by the creation of the exception.

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[34] The Third Circuit followed *Malfitano* in another case, *In re Grand Jury Matter*, 673 F.2d 688 (3d Cir.), *cert. denied*, 459 U.S. 1015 (1982), in which the government argued, both to the Third Circuit and in its petition for certiorari, that the witness-spouse should be compelled to testify both because she was a joint participant and because it had promised not to use her testimony against her husband, but only against other alleged conspirators. The latter issue is not involved here.

Finally, in assessing the government's claim of significant benefits to be obtained from eroding the marital privilege, it must be remembered that the exception even in theory permits the acquisition of evidence in a narrow category of cases that cannot be rationally separated out for special treatment. Where a spouse is truly a co-equal participant in a criminal venture, his or her evidence will in any event be unavailable to the government (absent a grant of immunity) because of the Fifth Amendment privilege against self-incrimination. It is only where the potential witness is sufficiently marginally involved that the government will be willing to displace the Fifth Amendment privilege with a grant of immunity that the marital privilege will become an issue. A "joint participant" exception that by the nature of the situation will affect only those cases in which the alleged participation is marginal and disputable is unlikely to generate much testimony of value, but extremely likely to generate mistaken applications to innocent spouses.[35]

4. *The "Crime or Fraud" Exception to Certain Confidential Communications Privileges is Clearly Distinguishable.*

As a last effort to rationalize its claimed exception, the government points to other privileges, such as the attorney-client and even possibly the marital confidential communications privileges, that it contends are subject to a crime or fraud exception that defeats the privilege when the person making the confidential communication has abused the relationship in order to further a crime or fraud. *Clark* v. *United States*, 289 U.S. 1 (1933) (attorney-client privilege); *United States* v. *Ammar*, 714 F.2d 238, 257-58 (3rd Cir), *cert. denied*, 104 S.Ct. 314 (1983) (marital communications).[36] By analogy, the government claims, the marital testimonial privilege should be subject to a similar exception, to prevent a criminal spouse from increasing his criminal powers by the recruitment of a co-conspirator who will be free of pressure to testify against him.

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[35] Nor can the government salvage its claim to compelling benefits by pointing to the supposedly unique danger of criminal conspiracies. Br. 26-28. The claim that a conspiracy between the spouses themselves presents the full range of threatening consequences attributed to conspiratorial agreements in *Callanan* v. *United States*, 364 U.S. 587, 593-94 (1961), rings hollow. And the government's concern for situations where a participant-spouse could testify against co-conspirators *other than* his or her spouse—a situation that, as the government recognizes, could also arise with non-participant witnesses—may well be resolvable by severing trials, or by providing use immunity for the nontestifying spouse. *Cf. Kastigar* v. *United States*, 406 U.S. 441 (1972).

This claim, too, however, is fatally flawed, for the marital testimonial privilege is not in fact analogous to the privileges subject to such an exception, in three vital respects. First, in the case of the confidential communications privileges, such as the attorney-client privilege, the privilege is held by the person making the confidential communication—the client, for example. *See, e.g.*, 2 Weinstein & Berger, *supra*, ¶ 503(c)[01] (attorney-client); 8 Wigmore, *supra*, § 2340 (marital communications). In the absence of the crime/fraud exception, a client would be able to use an attorney for criminal purposes, and then prevent the attorney from testifying against him. This Court's decision in *Trammel* has already solved this problem for the marital testimonial privilege. As Judge Friendly accurately pointed out below, the government's claim that recognition of the privilege in the "joint participant" situation would encourage criminals to recruit their spouses as co-conspirators (Br. 19) is overblown: since *Trammel*, "A person desiring to enlist the aid of his spouse as an accomplice cannot now be sure that he is not creating another potential witness; he takes the risk that the spouse may choose to testify." Pet. App. 10a-11a. Indeed, he increases that risk, for unlike the innocent spouse, the truly participating spouse (like Mrs. Trammel) may

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[36] This Court has never decided whether there *is* a "furtherance of crime" exception to the marital communications privilege. The issue is not presented here. For reasons set out in the text, even assuming *that* exception exists, the purported "joint participant" exception to the marital testimonial privilege is easily distinguishable.

well have a strong incentive to give testimony voluntarily, in order to escape prosecution herself.[37]

Second, the policies underlying the confidential communications privileges differ from those justifying the marital testimonial privilege, so that exceptions to one sort of privilege cannot be easily transferred to others. The attorney-client and marital confidential communications privileges exist to encourage specific types of communications. Since communications in furtherance of a criminal scheme are not among those that society seeks to encourage by making the privilege available, the rationale for the privilege does not apply. This is particularly the case with privileges extended to particular professions, such as the attorney-client privilege, which are provided for purely instrumental reasons and do not derive from fundamental human rights. As amply discussed above, the rationale for the marital testimonial privilege is not the encouragement of confidential communications between the spouses, but rather our traditional refusal to permit the government to disrupt the mutual faith and loyalty of married persons. This policy is offended by *any* attempt to force one spouse to betray the other, regardless of the spouses' relative culpability. Because the marital testimonial privilege is based on the close identification of spouses with each other, it is more closely analogous to the Fifth Amendment privilege against self-incrimination, which of course includes no exception for parties guilty of a crime.

Third, just as the rationales of the *privileges* differ, so do the rationales and operation of the *exceptions*. The crime or fraud exception to the attorney-client or marital confidential communications privileges applies whenever the *person making the communication* has a criminal purpose, regardless of the culpability of the person receiving it. This follows from the rationale of the exception: if the point of the exception is to prevent the criminal party to the relationship from abusing a privilege intended to encourage legitimate communications, the criminal's desire to abuse the privilege is controlling, not the culpability of the potential witness. The exception for which the government is contending here cannot be analogized. Here, the government seeks to make the lifting of the privilege turn on the culpability of the *witness*-spouse, regardless of the defendant's desire to abuse the relationship. But, if the marital testimonial privilege were truly analogous to the confidential communication privileges—as we have demonstrated it is not—the government's argument would suggest that the privilege should be unavailable whenever the *defendant*-spouse sought to use the marital relationship as a cover for crime, even if the witness-spouse were unwittingly so used. Such a rule, which is not the one demanded by the government, would obviously swallow up the marital privilege entirely in criminal cases.

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[37] The same could not be said of the marital communications privilege. In the absence of a "furtherance of crime" exception, a spouse who had voluntarily waived the testimonial privilege, or a former spouse who no longer possessed it, could still be prevented by the defendant spouse from testifying about marital communication that furthered a crime.

As with the government's other arguments, the unpersuasiveness of this one is further demonstrated by the total absence of support for it in the cases. Those courts that have rejected the "joint participant" exception here urged by the government have carefully distinguished the other privileges, and rejected the argument that application of a supposedly "analogous" exception to other privileges warrants creation of the "joint participant" exception to the marital privilege. Thus, the Third Circuit, as Judge Friendly noted below, "perceives no contradiction between its holdings . . . that there is no exception to the general spousal privilege for [joint] criminal activity and . . . 'that communications between spouses pertaining to ongoing or future criminal activity are not protected against disclosure by the privilege for confidential marital communications.' " Pet. App. 13a, comparing *In re Malfitano*, *supra*, 633 F.2d at 280, with *United States* v. *Ammar*, *supra*, 714 F.2d at 257-58.[38]

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[38] Other jurisdictions recognize by statute that provision for a "furtherance of crime" exception to the confidential communications

Indeed, the illogic of the government's analogy is recognized even by courts that have endorsed the government's position. Despite its adoption of both exceptions, the Seventh Circuit was careful in *Van Drunen* to avoid reliance on its earlier ruling accepting the "crime or fraud" exception to the marital communications privilege, *United States* v. *Kahn*, 471 F.2d 191, 194 (7th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973), *rev'd on other grounds*, 415 U.S.143 (1974), explicitly stating that *Kahn* was "not necessarily controlling, for the two marital privileges must 'be sharply distinguished.' " 501 F.2d at 1396, quoting McCormick, *Evidence* § 78 (2d ed. 1972). As Judge Friendly correctly pointed out, no court has applied the exception to the confidential communications privilege to compel testimony from an *unwilling* spouse. Pet. App. 12a.[39]

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In summary, then, the government's effort to distinguish cases covered by its proposed exception from others covered by the marital privilege is completely unsuccessful. By reaffirming the traditional marital privilege in *Hawkins* and *Trammel*, this Court has decisively concluded that any benefits that could be obtained from compelling a spouse to testify are outweighed by society's interest in supporting marriage and by the rights of married people not to have their intimate associations destroyed by government action. Once that balance is made, the further question whether to create an exception to the ordinary rule of privilege where the government claims that the witness

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privilege does not require acceptance of a "joint participant" exception to the marital testimonial privilege. *See*, *e.g.*, Alaska Rules of Evidence, Rules 505(a), 505(b)(2)(B) (1979); Puerto Rico Rules of Evidence, Rules 27(B), 27(D)(7) (1959).

[39] The fundamental practical reality about the marital communications privilege cases that the government ignores is that, because of the testimonial privilege, an issue regarding confidential communications will only arise where the witness-spouse is testifying voluntarily, or where the testimonial privilege is otherwise inapplicable, and the defendant-spouse invokes the confidential communications privilege. The balance of interests in such a case is radically different from that in this case, where the government seeks to compel an *unwilling* spouse to testify against her husband.

spouse was a participant in the crime is an easy one. None of the policies supporting the marital privilege apply with any less force in that situation; there is no special necessity beyond that intrinsically present in marital privilege situations that justifies a different rule. Finally, the failure of any jurisdiction retaining the marital privilege to provide for such an exception, whether by legislation or by judicial decision, or of any commentator to argue for its creation in the entire 400-year history of the privilege and of debate about it, strongly refutes the government's claim that "joint participant" cases must be singled out for special treatment.

C. Any Conceivable "Joint Participant" Exception Would Require a Stronger Showing of Participation Than Has Been Made in This Case.

The danger posed to marital intimacy by the government's claimed exception to the privilege is aggravated by the expansiveness of the government's position. Not only does the government seek an exception regardless of the seriousness of the alleged crime; it also seeks an exception that will apply on the flimsiest of showings of culpability of the witness spouse. The combination threatens to overwhelm the privilege, by dramatically increasing the risk that the exception will be applied mistakenly to disrupt marriages where in fact no joint involvement occurred.

The court of appeals cases on which the government relies, whatever their other flaws, at least were cases in which the participation of the witness-spouse was decisively proved. In *Clark*, the witness-husband had already been found guilty beyond a reasonable doubt by a jury of the crime of which his wife was also accused before the government sought to compel him to testify. 501 F.2d at 300. In *Trammel*, the witness-spouse had been caught by a customs search in the very act of importing narcotics. In both *Van Drunen* and *Trammel*, moreover, the witness-wives testified willingly, and themselves admitted their participation in the crime. In all three cases, therefore, the courts that found the privilege inapplicable had before them decisive first-hand evidence of the guilt of the witness spouse.

In stark contrast, the government here has not convicted Mrs. Koecher of any crime. No grand jury has charged her with any offense. Indeed, the government has not even filed a complaint against her. The reason for this reticence is apparent, for the government has proffered no independent first-hand evidence of her guilt that it could present to a trial jury or a factual hearing.

The only showing of Mrs. Koecher's "participation" that the government has offered is contained in a material witness affidavit filed by an FBI agent. This affidavit is based entirely on statements attributed to Mr. Koecher, purportedly selected from his responses during his ten-day interrogation by the FBI. The trial court found that this affidavit "shows probable cause" to believe that Mrs. Koecher participated in the offense. Pet. App. 38a.

The affidavit certainly cannot be taken as providing anything more than that. The statements attributed to Mr. Koecher by the affidavit are entirely hearsay as to Mrs. Koecher. The government could not improve on its hearsay affidavit by calling Mr. Koecher to testify; he is plainly unavailable to testify because of his Fifth Amendment privilege. Nor are the hearsay statements particularly reliable: they are selected from the fruits of a ten-day interrogation, which Mr. Koecher has moved to suppress as involuntarily made; they are unclear on their face regarding the knowledge and intent attributed to Mrs. Koecher; Mr. Koecher's motivations in making them are unknown, and his credibility impossible to assess; no corroborating evidence is offered. And because Mr. Koecher is unavailable for cross-examination, these crucial questions of credibility and context cannot be further explored.

If such hearsay assertions from an unavailable source are sufficient to destroy a 22-year marriage by stripping away the marital privilege, or (what amounts to the same thing) by shifting the burden to Mrs. Koecher to rebut the government's showing by testifying about the very matter about which the government seeks her testimony, there will be very few cases in which the privilege will still apply. The circumstances thus fully justify Judge Friendly's statement that

> Another factor inclining us to reject a joint participation exception to the spousal privilege is the difficulty often encountered in establishing the predicate without invading the privilege. This case is a good example.

Pet. App. 13a-14a (footnote omitted). The government apparently has no evidence whatever that Mrs. Koecher participated in any wrongful act, aside from statements allegedly wrung from her husband during interrogation. Judge Friendly is certainly correct that this problem argues against recognizing an exception to the privilege: the "natural repugnance" referred to by Wigmore must surely be intensified where the government elicits statements incriminating a wife during a lengthy interrogation of her husband, then uses those very statements as the sole basis for its claim that the wife must testify to buttress the case against the husband. Such circular reasoning can be the expected fruit of any "joint participation" exception.[40]

If a joint participation privilege of any kind is considered, we submit this Court must consider carefully the kind of showing that the government must make before the sanctity of marriage can be invaded. At the very least, a factual showing by clear and convincing first-hand evidence at a factual hearing would be appropriately required before it can be assumed that

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[40] Moreover, as the Third Circuit cogently observed, permitting the privilege to be defeated by so conclusory a showing would undermine the privilege in virtually all cases:

> The very nature of conspiracy cautions against this exception . . . . Where the spouse does not want to testify, the only way to get her testimony will be to accuse her . . . . Given the intimacy of marriage and the fact that conspiracy is a rather flexible concept, it will be quite easy to allege that the spouses are partners. Ironically, the closer the marriage, the more likely it will appear that both spouses are involved . . . . Thus, recognition of an exception where it can be said that both spouses are involved will tend to undermine the marriage precisely in the manner that the privilege is designed to prevent.

In re Malfitano, *supra*, 633 F.2d at 279.

a spouse is in fact a "joint participant" in crime. That standard clearly has not been met here.[41]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[41] No court considering this case has ever made the preliminary fact finding the government suggests is the appropriate standard for determining "joint participation." Br. 18-19 n. 14. The most that any court has concluded is that the government's affidavit established "probable cause," and even that opinion was offered by way of dictum. Pet. App. 38a. *Cf.* Pet. App. 41a-42a. Nor can Mrs. Koecher be found to have waived or conceded the issue by asserting that no "joint participation" exception existed; she and her then counsel cannot be faulted for not anticipating whatever this Court might conclude are the precise contours of any such unprecedented exception. Mrs. Koecher has consistently asserted her innocence (*see* p. 3 n.4 above), and no court has ever made a contrary finding. In these circumstances, should this Court decide that a "joint participant" exception to the marital privilege may exist in some situations, and that the government's showing is sufficient to raise an issue as to its applicability in this case, a remand to the courts below to permit development of a fuller record on the factual issue would still be necessary before Mrs. Koecher could again be ordered to testify against her husband of 22 years.

REPLY
BRIEF

(5)

Supreme Court, U.S.
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JAN 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1922

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

HANA KOECHER

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

CHARLES FRIED
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Department of Justice
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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1922

UNITED STATES OF AMERICA, PETITIONER

v.

HANA KOECHER

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. Respondent's argument against recognition of a joint participant exception to the marital testimonial privilege rests to a significant extent upon several basic misconceptions concerning the source of the privilege and the interests it is designed to protect. Ignoring this Court's conclusion in *Trammel* v. *United States,* 445 U.S. 40 (1980), that the roots of the privilege are in "medieval jurisprudence" (*id.* at 44) and that the privilege should be construed in a manner that "furthers the important public interest in marital harmony *without unduly burdening legitimate law enforcement needs*" (*id.* at 53 (emphasis added)), respondent attempts to develop an entirely new basis for the privilege that would prevent its modification to reflect the different balance of interests that may exist in various circumstances. Respondent's attempts to reconstruct and modify the bases for the privilege do not withstand scrutiny.

a. Respondent first suggests that the privilege against adverse spousal testimony is grounded in the Constitution, and intimates that a joint participant exception to the privilege would be constitutionally impermissible. Thus, respondent states (Br. 14) that "[r]espect for and support of the institution of marriage is not only governmental policy, but a constitutional command" and (Br. 20) that "the marital unit is constitutionally protected against governmental disruption." She argues (Br. 19) that marriage is a "fundamental right that can only be restricted by the state under the most compelling necessity."

Respondent's apparent contention that the marital testimonial privilege is compelled by the Constitution is entirely untenable. There is, of course, no mention of the marital testimonial privilege in the Constitution. In fact, the privilege "sprang from two canons of medieval jurisprudence," both of which are now outmoded: the rule that an accused could not testify in his own behalf, and the concept that husband and wife had no separate legal existence from one another. *Trammel*, 445 U.S. at 44. Rule 501 of the Federal Rules of Evidence provides that the privilege is "governed by the principles of the common law as they may be interpreted * * * in the light of reason and experience," a test that in no way implies that the privilege has a constitutional basis. Finally, contrary to respondent's assertion (Br. 24), this Court's comprehensive discussion of the privilege in *Trammel* does not even hint that the privilege is grounded in the Constitution. If the privilege had a constitutional basis, we doubt that fact would have escaped the Court's notice.

Of course, if the privilege were compelled by the Constitution, the authority of the States to define the scope of the privilege would be limited, a result that is inconsistent with this Court's recognition in *Trammel* (445 U.S. at 48-49) that the States' construction of the privilege is relevant in defining the federal rule. Indeed, the 19 States that have abolished the marital testimonial privilege would be required to recognize the privilege if respondent's constitutional analysis were adopted by this Court.

The decisions of this Court upon which respondent relies to justify her constitutional theory have nothing to do with the marital testimonial privilege. In those cases, the Court struck down statutes interfering with persons' right to marry or with their right to engage in intimate aspects of the marital relationship. *Zablocki* v. *Redhail*, 434 U.S. 374 (1978) (statute restricting right to marry); *Loving* v. *Virginia*, 388 U.S. 1 (1967) (same); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (statute forbidding the use of contraceptives by married persons). The absence of a testimonial privilege does not restrict the right to marry or in any way interfere with the right of privacy in intimate marital relations that was the basis of the decision in *Griswold*, especially in view of the fact that a separate privilege bars the revelation of confidential marital communications.

The testimonial privilege is a special benefit conferred by society upon married persons, exempting them in some circumstances from the general rule that " ' "the public * * * has a right to every man's evidence " ' " (*Trammel*, 445 U.S. at 50, quoting *United States* v. *Bryan*, 339 U.S. 323, 331 (1950)). Since the Constitution surely does not require that the government must insulate married persons from an obligation that applies to all members of society wherever that result would promote or protect the institution of marriage, there is no basis for respondent's attempt to import constitutional law into the construction of the marital privilege. *Grand Jury Subpoena of Ford* v. *United States*, 756 F.2d 249, 255 (2d Cir. 1985); *United States* v. *Lefkowitz*, 618 F.2d 1313, 1319 (9th Cir.), cert. denied, 449 U.S. 824 (1980); *United States* v. *Doe*, 478 F.2d 194, 195 (1st Cir. 1973).[1] If the Court concludes that reason and experience favor recognition of a joint participant exception, we think it may confidently be said that nothing in the Constitution requires a different result.

b. Respondent also bases her interpretation of the privilege on her view (Br. 16) that the privilege's "fundamental justification * * * is what Wigmore referred to as the 'natural repugnance' in 'every fairminded person' at the spectacle of requiring a person to cooperate in the prosecution" of that person's spouse. We demonstrated in our opening brief (at 20-21 n.15) that to the extent this theory is relevant in analyzing the scope of the privilege, it is nothing more than a restatement of the societal interest in marital harmony that this Court in *Trammel* held to provide the basis for the privilege. (The opinion in *Trammel* does not even mention the "natural repugnance" repeatedly invoked by respondent.) Society at large presumably would feel such a natural repugnance at the compelled testimony of one spouse against another because of its concern about the impact of the testimony on the harmony of the spouses' marriage. Indeed, this is the only way to square the "natural repugnance" rationale with the recognized contours of the privilege. For example, the privilege does not apply to testimony about crimes committed by one spouse against another or against their children (U.S. Br. 17); presumably there is no insurmountable "natural repugnance" in compelling the witness-spouse to testify in such circumstances

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[1] The courts of appeals also have rejected arguments like respondent's (see Br. 16, 33-34) that the privilege is analogous to the Fifth Amendment privilege against self-incrimination. See, *e.g., In re Grand Jury Proceedings,* 664 F.2d 423, 429-430 (5th Cir. 1981), cert. denied, 455 U.S. 1000 (1982). Despite respondent's protests to the contrary (Br. 16-17 n.14), that argument obviously is nothing more than a restatement of the anachronistic medieval concept that a husband and wife have no separate legal identity.

because the particular marriage relationship does not conform to society's conception of what a marriage should be, and society therefore is less concerned about the effect upon the marriage of the spouse's testimony.[2]

c. Respondent also seeks to bolster the privilege by contending (Br. 21-22) that recent scholarly treatment of the privilege has been favorable, in contrast to the trend of unfavorable scholarly opinion cited by the Court in *Trammel* (445 U.S. at 44-45). However, the recent articles on which respondent relies clearly reveal the tremendous gap between the privilege constructed by respondent and the privilege recognized by this Court. For example, respondent cites a student article that describes the marital privilege as a legal rule that "maintain[s] male power by promoting the institution of marriage," thus "perpetuat[ing] male dominance over women." Note, *Developments in the Law—Privileged Communications,* 98 Harv. L. Rev. 1450, 1586-1587 (1985) (footnote omitted). Rather than recommending abolition of the privilege, the students recommend extending it "beyond legally recognized marriages to a broader category of 'intimate relationships' that includes relationships between unmarried cohabitants, homosexual lovers, and 'intimate' friends" (*id.* at 1590). Similarly, in an audacious assault upon the concept of compulsory process, Professor Levinson suggests that the privilege should not be limited to married persons and that instead persons should be allowed to decide for themselves which of their associates are so close that the state should not be allowed to compel them to testify. Levinson, *Testimonial Privileges and the Preferences of Friendship,* 1984 Duke L.J. 631, 655.

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[2] There presumably is at least as much "natural repugnance" at compelling a child to testify against its parent, or vice versa, as there is in the case of married persons. But our legal system recognizes that this is at times an unfortunate necessity prompted by the compelling need for just and accurate trial outcomes—a need found important enough to justify testimonial compulsion despite our "natural repugnance."

These articles obviously rest upon a conception of testimonial privileges radically different from the principles that guide this Court's decisions. Suffice it to say that this Court has long recognized society's "need for probative evidence in the administration of criminal justice" (*Trammel*, 445 U.S. at 51), and the suggestions contained in these recent articles give no weight at all to that fundamental value.

Furthermore, respondent describes Professor Black's comments, on which she places great weight (see Br. 16, 34), in a misleading manner. Professor Black was discussing a proposal to eliminate the marital privilege altogether in civil proceedings~~, to~~ which he objected on the ground that it could lead to the forced disclosure of any intimate fact "if it is thought barely relevant to the issues in anybody's lawsuit for breach of a contract to sell a carload of apples." *The Marital and Physician Privileges—A Reprint of a Letter to a Congressman*, 1975 Duke L.J. 45, 48. Immediately following that statement, Professor Black wrote that "any decent person" would want to evade or disobey such a rule (*ibid.*). There is, of course, a world of difference between a contract dispute over apples and the theft and delivery of vital state secrets to an unfriendly foreign power, and Professor Black did not say, as respondent implies, that any decent person would refuse to testify against a spouse who had committed criminal acts.[3]

d. In sum, respondent has presented no legitimate new justification for the privilege, no evidence that the trend toward abolition of the privilege (see U.S. Br. 25-26) has abated, and, accordingly, no reason for this Court to define the privilege any differently than it did in *Trammel*. The appropriate inquiry therefore remains whether, in the particular proposed application at issue here, the privilege furthers society's interest in marital harmony without unduly burdening law enforcement needs.

2. Stripped of its meritless efforts to shift the basis for the privilege away from the rationale previously recognized by this Court, respondent's argument is that the situation at issue here—in which the privilege is invoked to withhold testimony concerning spouses' activities as partners in crime—is no different from that in which the privilege is asserted by an innocent witness-spouse. Respondent fails to support this position persuasively.

a. In contending that co-conspirator spouses should enjoy the same privilege as innocent spouses, respondent essentially ignores two important facts that distinguish the two situations. First, the application of the privilege is fundamentally different here because the spouses have brought upon themselves the obligation to testify. Society's interest in promoting marital harmony is reduced by the spouses' own joint decision to overstep the rules of conduct established by society (see U.S. Br. 21). Second, when the matter is assessed from a perspective prior to the commission of the contemplated crime, it is the privilege, not our proposed joint participant exception, that is inimical to the institution of marriage. A criminal will have an incentive to recruit his or her spouse as a co-conspirator if the spouse will be able to assert the privilege. Although the criminal no longer has an absolute veto over the spouse's ability to testify after this Court's decision in *Trammel*, he or she still can gain a substantial benefit from a spouse's willingness to refrain from volunteering evidence, as this case demonstrates (see U.S. Br. 19-20). Without a joint participant exception, therefore, the privilege would encourage the recruitment of spouses as partners in crime.

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[3] Respondent also notes (Br. 23) that Great Britain recently amended its criminal evidence rules to provide that a spouse may choose to testify adversely to his or her spouse, the step that this Court took in *Trammel*. Respondent considers it significant that Great Britain did not go farther in limiting the marital privilege. We think that Great Britain's action merely illustrates the cautious approach, common to legislatures as well as courts, of implementing changes one step at a time. Respondent points to nothing suggesting that the British specifically considered and rejected the co-conspirator exception at issue here.

b. Moreover, the application of the privilege in this context confers an unjustified benefit upon spouses who have used their marriage as a base from which to injure society. As we discussed in our opening brief (at 16, 22), marriage is an important institution from a societal as well as a personal perspective. Respondent recognizes (Br. 14) that marriage is important to society because it promotes the values that are necessary to society's existence. ("The family [is] * * * the basic building block of civilized society, and marriage [is] * * * the basis for the traditional family.") In our view, it is this "*public interest* in marital harmony" that is relevant in determining whether a testimonial privilege should be recognized in a particular class of cases. *Trammel,* 445 U.S. at 53 (emphasis added).[4] This interest obviously is reduced substantially when the marriage is used for criminal ends; even respondent acknowledges that "when a husband and wife commit a crime, their criminal behavior violates society's norms" (Br. 30). Since the spouses' joint activity thwarts rather than furthers society's goals, the privilege should not apply.

Respondent contends (Br. 30) that the joint commission of a criminal act is not a sufficient justification for concluding that the privilege should not apply because other aspects

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[4] The Court also stated that " 'permitting a refusal to testify or excluding relevant evidence has a *public good* transcending the normally predominant principle of utilizing all rational means for ascertaining truth' " (*Trammel,* 445 U.S. at 50 (emphasis added), quoting *Elkins* v. *United States,* 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)). This emphasis on societal interests has long been recognized as proper in determining whether an evidentiary privilege should be recognized. See 8 J. Wigmore, *Evidence* § 2285 (McNaughton rev. 1961).

of the spouses' marriage could sufficiently accord with society's values to support retention of the privilege. Whether that is so is the issue before the Court. But, contrary to respondent's repeated assertions (see, *e.g.*, Br. 30, 31), it is not our contention that marriages in which the spouses are partners in crime are wholly "valueless" or are relationships that should be destroyed, nor need the Court come to any such conclusion in sustaining our contention. Our position is simply that such behavior is so incompatible with society's values and the interests underlying the testimonial privilege that the balance of competing interests tips against the availability of the privilege. In such circumstances, there is insufficient reason to "contravene the fundamental principle that " ' "the public * * * has a right to every man's evidence" ' " (*Trammel,* 445 U.S. at 50, quoting *United States* v. *Bryan,* 339 U.S. 323, 331 (1950)).[5]

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[5] Respondent's statements characterizing our position apparently are based upon the observation in *Hawkins* v. *United States,* 358 U.S. 74, 78 (1958), that "[a]dverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage." Of course, the Court in *Trammel* overruled *Hawkins* 'holding that one spouse may not voluntarily testify against the other, and the analysis in *Hawkins* concerned the effect upon the marriage of *voluntary* adverse testimony (see 358 U.S. at 77-78). We submit that *compelled* adverse testimony—where the witness-spouse must either testify or go to jail—is much less likely to result in such drastic consequences to the marriage (see U.S. Br. 12 n.10). In any event, acknowledgment that the privilege serves to insulate a marriage from strain that might result from compelled testimony does not by any means lead to the conclusion that compelled testimony automatically would destroy a marriage.

In addition, contrary to the implication of respondent's argument, it is not unusual for the availability of the testimonial privilege to turn on the character of the criminal activity at issue in a particular case. Thus, the application of the exception to the privilege for crimes committed against a spouse or a spouse's children (U.S. Br. 17) depends solely upon the nature of the offense under investigation. The same rule applies with respect to the exception sometimes recognized for events occurring prior to the marriage (U.S. Br. 24-25 n.19).

Respondent also argues (Br. 30-32) that the privilege should apply because the witness's compelled testimony would be an "invasion[] of marital privacy and intimacy" (Br. 31).[6] We do not dispute that marriage is an extremely important personal relationship, but the question here is whether a privilege to withhold evidence from the truth seeking process should be available to spouses who jointly commit criminal acts.[7] Respondent's arguments do not justify the application of the privilege in this context. First, a spouse's testimony would rarely if ever result in the invasion of marital privacy; the testimony would concern the spouses' criminal activities, not the intimate aspects of their marriage relationship.[8] Second, the fact that marriages might be strengthened or protected if such testimony could be withheld is not the only relevant consideration in determining whether the privilege should apply where the spouses have used their marriage to attack society. The question instead is whether the spouses—despite their patently antisocial behavior—should retain a benefit conferred by society. In our view, the rejection of the privilege by a substantial number of States and commentators indicates that the balance of the relevant interests weighs only slightly in favor of permitting even an *innocent* witness-spouse to withhold probative evidence from the truth seeking process. The spouses' joint criminal activity tilts this already-close balance against recognizing the privilege.[9]

c. Respondent also contends that we exaggerate the benefits to be derived from the adoption of a joint participant exception to the privilege. She first asserts (Br. 36) that in the only reported case in which the government has attempted to apply the joint participant exception to compel the testimony of an unwilling witness, the spouse refused to testify and was held in contempt. This is a completely unreliable basis upon which to assess the usefulness of a joint participant exception. It may be that joint participant spouses in the Seventh and Tenth Circuits simply decide to obey orders to testify. Or it may be that any decisions are not reported, the relevant legal principles being already settled in those circuits. Moreover, the joint participant exception has not been established in those circuits for a substantial period of time.[10] Respondent thus has presented no legitimate basis for challenging the general assumption that the penalties of contempt often encourage recalcitrant witnesses to testify (see U.S. Br. 29 n.24).

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[6] In its characteristically overstated style, respondent's brief compares the government's actions in this case to those of the "totalitarian torturers of Orwell's *1984*" (Br. 20-21). In this case, the government, following all standards of due process, called respondent before a grand jury and asked her whether she had ever met with agents of the Czechoslovakian Intelligence Service, whether she had ever delivered classified national security information to those agents, and whether she had ever received payment for delivering such information to those agents. It cannot seriously be suggested that such actions are in any way comparable to the conduct described in *1984*.

[7] It is the government's policy to attempt to minimize compulsion of the testimony of one spouse against the other. The *United States Attorneys' Manual* § 1-11.214 (Mar. 23, 1984) instructs federal prosecutors to "avoid compelling the testimony of a witness who is a close family relative of the defendant on trial or of the person upon whose conduct grand jury scrutiny is focusing." It goes on to provide, however, that it may be necessary to compel family members to testify against each other where they jointly participated in crime or where "the testimony to be elicited relates to a crime involving overriding prosecutorial concerns," such as espionage (*id.* at 9).

[8] Significantly for purposes of this point, the courts have uniformly held that the marital communications privilege, which is more directly targeted at protection of marital intimacy, is unavailable in the co-conspirator context (see U.S. Br. 23). This wholly undermines respondent's marital intimacy argument.

[9] Respondent also argues (Br. 30-31) that compelling a witness to testify in these circumstances would create a feeling of "natural repugnance." As we have discussed (see pages 4-5, *supra*), this rationale adds nothing to the other interests in considering whether the privilege should apply in this context. Even if this concept had independent analytic content, however, we believe that the fact that the spouses jointly participated in the crime under investigation is likely to preclude any such reaction by the public at large (see U.S. Br. 20-21 n.15). Indeed, fair-minded persons are more likely to be repulsed by the spouses' use of their marriage to further criminal ends.

Respondent also contends (Br. 37) that the joint participant exception is unlikely to result in probative evidence because the exception will be applied only in cases involving "marginal" participation by the spouse who is forced to testify. According to respondent, the government will not seek use immunity for witness-spouses who are more deeply involved in the offense. Again, the conclusion respondent draws simply does not follow. It is correct that the government will choose to immunize the less culpable spouse and prosecute the more culpable spouse in a particular situation, just as the government attempts to select the less culpable party whenever it decides to immunize a witness in any case involving multiple defendants. Experience shows that such less culpable parties often are able to provide a great deal of useful evidence. And, as we stated in our opening brief (at 26-27), a spouse who jointly participated in criminal activity is likely to have a great deal of useful information about third-party participants (much more so than a spouse who has not participated in the criminal activity). In this case, for example, respondent, although apparently involved in the espionage to a lesser extent than her husband, may still be able to provide useful information regarding the identities and roles of other foreign agents in this country.

d. For these reasons, we submit that the privilege should not be available when a spouse's testimony is sought

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[10] As noted (see note 7, *supra*), the government does not often attempt to compel adverse testimony by a spouse, so it is not possible to provide extensive empirical evidence concerning the effect of contempt sanctions upon spouses' willingness to testify.

regarding joint criminal activity. We see little basis to fear that the recognition of a joint participant exception will lead to its application in a substantial number of cases or in cases in which the need for the spouse's evidence is insubstantial. Indeed, the government's policy against routinely compelling the testimony of family members would serve to preclude this result. If, however, the Court remains troubled by the possibility—however unlikely—that the exception could be applied indiscriminately and without regard to the existence of a real need for the spouse's evidence, that concern can be dealt with by requiring the government to establish that it has substantial need of the spouse's testimony and cannot obtain the same or equivalent probative evidence by other reasonably available means. Compare *United States* v. *Nixon,* 418 U.S. 683, 707-713 (1974); *Hickman* v. *Taylor,* 329 U.S. 495, 509, 511 (1947); Fed. R. Civ. P. 26(b)(3). Although we do not espouse this additional requirement or believe it to be necessary, it would assure that use of the exception is limited to cases in which the government's need for the evidence is substantial—*i.e.,* cases in which there is a demonstrably strong societal interest weighing against the recognition of the privilege.

3. a. Throughout her brief, respondent misstates the factual showing that is required as a predicate for the application of the joint participant exception to the privilege. She repeatedly refers to a "mere accusation" or allegations by the government that the spouses engaged in joint criminal conduct (see, *e.g.,* Br. 29, 31). As respondent should be well aware, our position (U.S. Br. 18-19 n.14) is that the government must make a prima facie showing based upon independent evidence that the spouses jointly participated in criminal activity. Respondent argues (Br. 44) without citation that the government should be required to produce "clear and convincing first-hand evidence" in order to

overcome the privilege. But prima facie evidence of criminal activity is all that has been required to overcome the analogous attorney-client privilege (*In re Berkley & Co.*, 629 F.2d 548, 553 (8th Cir. 1980); see also *Clark* v. *United States*, 289 U.S. 1, 15 (1933)), and there is no reason why a different rule should be applicable here. As a practical matter, the only stronger showing that could be made—which respondent apparently would require (Br. 42)—is an actual conviction of the witness-spouse on a charge relating to the activity for which the defendant-spouse is accused or an admission of joint participation. Such a high standard, amounting to proof of joint participation beyond a reasonable doubt, is simply inappropriate for use in determining whether the predicate for withdrawal of a privilege has been established.

b. Respondent also asserts (Br. 42-45) that the government has failed to show that she and her husband jointly participated in acts of espionage. Therefore, respondent argues, the court of appeals' decision should be affirmed even if the Court holds that the marital testimonial privilege does not apply in cases where spouses were partners in crime. There is no merit to this argument.

Respondent did not contest the government's offer of proof regarding this issue at the initial district court hearing relating to her assertion of the privilege,[11] and the government accordingly did not submit its full proof regarding the issue. Thus, respondent at most would be entitled to a remand directing the district court to hold a hearing to allow respondent to contest the government's proof.

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[11] Respondent's statements (see Br. 2-3 & n.4) are quite misleading on this point. A review of the transcript of the hearing shows that respondent never requested that the government be put to its proof regarding this issue (see Nov. 29, 1984 Tr.).

In any event, the evidence concerning respondent's participation in the offense was ample to support the application of the joint participant exception to the privilege. The government submitted an affidavit to the district court, based on Karel Koecher's statements to FBI agents, showing that respondent was present at several meetings between 1962 and 1983 with agents of the Czechoslovak Intelligence Service (CIS) at which she and her husband received instructions relating to their espionage activities, that she delivered documents to the CIS, and that she received payments from the CIS. The statements in that affidavit, while hearsay, are admissible with regard to whether the marital privilege should apply. See Fed. R. Evid. 104(a). Karel Koecher's statements supply extremely reliable evidence of his wife's participation with him in acts of espionage against the United States.[12]

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JANUARY 1986

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[12] While respondent describes Karel Koecher's admissions as "statements allegedly wrung from [him] during interrogation" (Br. 44), his challenge to the admissibility of the statements is based on his claim that he was promised immunity in return for making them, rather than any assertion that the statements are inaccurate.

MOTION

Supreme Court, U.S.
FILED
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ON WRIT OF CERTIORARI TO
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MOTION OF THE UNITED STATES TO VACATE AS MOOT

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In November 1984 a grand jury investigating espionage sought to question respondent concerning her activities on behalf of the Czechoslovak Intelligence Service. Respondent refused to answer. She claimed that the answers would be adverse to the interests of her husband and that the marital testimonial privilege exempted her from testifying. The United States District Court for the Southern District of New York held her in civil contempt pursuant to 28 U.S.C. 1826(a), concluding that the marital testimonial privilege does not stand as a bar to testimony concerning a joint criminal enterprise in which a husband and wife are both engaged. The Second Circuit subsequently issued an order vacating the order of civil contempt because it concluded that respondent could not be compelled to testify against her husband. On October 7, 1985, this Court granted our petition for a writ of certiorari to review the Second Circuit's judgment; oral argument was held on January 15, 1986.

On February 3, 1986, respondent's husband pleaded guilty to one count of conspiracy to commit espionage; thereafter, respondent and her husband left the United States and were repatriated to Czechoslovakia on February 11 as part of a "spy swap." The grand jury therefore will not have further occasion to seek to question respondent. These developments have rendered the case moot.

We accordingly request that the judgment of the court of appeals be vacated. "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot * * * pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) (footnote omitted); see also *County of Los Angeles* v. *Davis,* 440 U.S. 625, 634 (1979); *Weinstein* v. *Bradford,* 423 U.S. 147, 149 (1975); *Preiser* v. *Newkirk,* 422 U.S. 395, 403-404 (1975); *Board of School~~s~~ Commissioners* v. *Jacobs,* 420 U.S. 128, 130 (1975). That practice eliminates any collateral consequences of the judgment below. It also makes clear that the decision below is not established precedent, a useful practice with respect to a decision that this Court has chosen to review when such "review * * * was prevented through happenstance." *Munsingwear,* 340 U.S. at 40.

We therefore move that the Court vacate the judgment below and remand for such further proceedings as may be appropriate.

Respectfully submitted.

CHARLES FRIED
Solicitor General

FEBRUARY 1986